No. 06-5306
Title: Keith Bowles, Petitioner
v.
Harry Russell, Warden
Docketed: July 18, 2006
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (04-3262)
Decision Date: December 28, 2005
Rehearing Denied: April 21, 2006
Questions Presented

| ~~Date~~ | ~~~~~~~~Proceedings and Orders~~~~~~~~

9

(5)

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM 2005

CASE NO. 06-5306

KEITH BOWLES

Petitioner

vs.

HARRY RUSSELL

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether an appellate court may ***sua sponte*** dismiss an appeal which has been filed within the time limitations authorized by a district court after granting a motion to reopen the appeal time under Rule 4(a)(6) of the Federal Rules of Appellate Procedure.

OPINIONS BELOW

The United States Court of Appeals issued a published opinion which is reported at432 S.3d 655 (6th Cir. 2005).

The United States Disfrict Court for the Northern District did not issue a published opinion. A copy of the relevant District Court judgments and orders are attached.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit filed its opinion and judgment dismissing the case for lack of jurisdiction on December 28, 2005. Petitioner timely filed a petition for a rehearing and a suggestion for a rehearing en banc. On April 21, 2006, the United States Court of Appeals for the Sixth Circuit denied the petition for a rehearing. The statutory provision believed to confer jurisdiction is 28 U.S.C. §1257.

RULE OF APPELLATE PROCEDURE INVOLVED

RULE 4(a)(6) of the Federal Rules of Appellate Procedure

(a) Appeal in a Civil Case

* * *

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied.

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the movinf party received notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C)the court finds that no party would be prejudiced.

Rule 26(b)(1) of the Federal Rules of Appellate Procedure.

> **(b) Extending Time.** For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:
>
> (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

STATEMENT OF THE CASE

Petitioner Keith Bowles, instituted this action seeking a writ of habeas corpus with respect to the judgment and sentence entered by the Court of Common Pleas of Lake County, Ohio. Petitioner was convicted of murder and sentenced to a term of imprisonment of fifteen (15) years to life. His petition was filed on August 5, 2002. Respondent filed a return of writ on October 24, 2002.

Petitioner thereafter filed his traverse to the return of writ and his brief on December 2, 2002.

The Magistrate Judge, on May 23, 2003, issued a report and recommendation recommending that the petition be denied. Petitioner thereafter filed his objections and exceptions to the report and recommendation of the Magistrate Judge on June 27, 2003. Respondent filed a response to petitioner's objections on July 10, 2003.

On the same day, July 10, 2003, the District Court filed its memorandum and opinion adopting the Magistrate Judge's report and recommendation together with a concurrent judgment entry dismissing the petition for writ of habeas corpus.

Petitioner thereafter filed a motion for a new trial or to alter and amend judgment on August 6, 2003. The District Court denied the motion in an order which was not served

on either petitioner or his attorney. Thereafter, petitioner filed a motion to vacate and to reopen the time for the appeal on December 12, 2003. The District Court, on February 10, 2004, granted the motion to reopen the appeal time. Thereafter petitioner, on February 26, 2004, filed his notice of appeal.

On December 28, 2004, the Court of Appeals issued a certificate of appealability on the following issue:

> **[W]hether Bowles was denied a fair trial and his constitutional rights under the Fifth, Sixth and Fourteenth Amendments by the prosecution's questions to him on cross-examination about the fact that he did not make a statement to the police and by the prosecutor's comments regarding his failure to volunteer a statement to the police. ...**

The United States Court of Appeals for the Sixth Circuit dismissed the appeal stating that petitioner did not file a timely notice of appeal within the time specified by the Rules of Appellate Procedure although the notice of appeal was filed timely in accordance with the extension of time properly granted by the United States District Court. Petitioner sought a rehearing en banc or a rehearing from the original panel. This motion was denied on April 21, 2006.

REASONS FOR GRANTING THE PETITION

This petition should be granted because the Court of Appeals misinterpreted, misapplied tRule 4(a)(6) of the Federal Rules of Appellate Procedure. Petitioner timely filed a notice of appeal within the time specified by the United States District Court when it had granted petitioner's motion to reopen the time for appeal. The District Court had that authority. The reasoning of the United States Court of Appeals for the Sixth Circuit conflicts with decisions by this court concerning timeliness of a notice of appeal.

ARGUMENT

THE DISTRICT COURT MAY PROPERLY GRANT AN EXTENSION OF TIME WHEN IT GRANTS A MOTION TO REOPEN AN APPEAL.

The issue in this case concerns the authority of a District Court to extend the time to file a notice of appeal beyond the fourteen (14) days authorized by Rule 4(a)(6) of the Federal Rules of Appellate Procedure.

The Court of Appeals ruled that the District Court did not have authority to grant more than fourteen (14) days to file a notice of appeal. Thus, it was deprived of jurisdiction. However the extension granted by the District Court was only involve's a claim processing rule which was not a jurisdictional barrier.

In this regard the Sixth Circuit decision conflicts with the recent pronouncement by the United States Supreme Court in ***Eberhart v. United States***, 126 S.Ct. 403 (2005).

The Court of Appeals in this case, in its opinion announced December 28, 2005, dismissed petitioner's appeal reasoning that the District Court, which had granted petitioner's request to reopen his appeal, had allowed the appeal to be filed beyond the fourteen-day period specified by Rule 4(a)(6)of the Federal Rules of Appellate Procedure.

This court, @ page 1 of the opinion ruled, **"that the fourteen-day period of Rule 4(a)(6) of the Federal Rules of Appellate Procedure is not susceptible to extension through mistake, courtesy, or grace."** However that conclusion was flawed for a number of reasons.

First, petitioner properly and timely sought relief in the District Court. The District Court found merit in petitioner's motion to reopen the time for appealing. However, the District Court, through no suggestion from petitioner, extended the fourteen (14) day time

beyond specified by the rule. Petitioner, relying on the District Court's order, filed his notice of appeal within the time specified by the District Court.

Petitioner's situation is analogous to ***Eberhart v. United States***, 126 S.Ct.403 (2005). In ***Eberhart***, the Supreme Court considered an untimely filing of a motion for a new trial in a criminal case which motion was required to be filed within seven (7) days after the verdict or finding. In ***Eberhart*** the defendant filed his motion for a new trial beyond that period of time. Thus his appeal was thereafter dismissed by the Court of Appeals as being untimely. Upon review by the United States Supreme Court the court ruled that there was a critical difference between a rule governing subject matter jurisdiction and an inflexible claim-processing rule, citing ***Kontrick v. Ryan***, 540 U.S. 443, 456 (2004).

However the opinion in this case is flawed because the Court of Appeals failed to consider petitioner's motion to reopen the appeal was timely filed. However, inadvertently and without suggestion from petitioner, the District Court granted petitioner time to file a notice of appeal beyond the fourteen (14) day period specified in the rule. Consequently this was not a situation where the application to reopen the appeal filed by petitioner was filed outside any time limitations specified in Rule 4(a)(6) of the Federal Rules of Appellate Procedure.

The Court of Appeals went to great length to distinguish the Supreme Court decision in ***Harris Truck Lines, Inc. V. Cherry Meat Packers, Inc.***, 371 U.S. 215 (1962), where the Supreme Court concluded that a district court's granting of an extension of time to appeal to a civil litigant to file a notice of appeal was proper even if it was not in strict conformity with the rule.

Second, even if it be assumed that the District Court was in error in granting the requested extension, and inadvertently granted an extension beyond that allowed by the rule that order was appealed by petitioner as was the denial of his motion to vacate.

Consequently, if that were an error then the remedy in the Court of Appeals would be to vacate and remand the case to the United States District Court ordering that the District Court's order be vacated and furthering ordering the District Court to enter a proper order granting an extension of time for the fourteen-day period allowed by Rule 4(a)(6) of the Federal Rules of Appellate Procedure or vacating its order denying appellant's Rule 59 motion to alter and amend judgment.

The Court of Appeals, in its opinion, avoided this solution by asserting that petitioner would not appeal a favorable decision. However it turns out the decision was not wholly favorable to petitioner. This Court of Appeals did have jurisdiction over the order being appealed. Consequently, to avoid an injustice the Court of Appeals should have vacated that order and remanded the case to the District Court with instructions to enter an order granting an extension of time for the fourteen-day period or vacating its order denying the motion to alter and amend judgment.

Third, the court misread the rules of appellate procedure governing extensions of time. Rule 4(a)(6)of the Federal Rules of Appellate Procedure, which governs the reopening of the time for an appeal, sets an outside limit of 180 days. The 180 day time limit is the only time that cannot be extended. However, Rule 26(b)(1)of the Federal Rules of Appellate Procedure provides for an extension of time. It only prohibits an extension of time to file a notice of appeal except as authorized by Rule 4 of the Federal Rules of Appellate Procedure.

Consequently the only prohibition against an extension of time would be extending the 180 day time limitation to file an application to reopen the time to appeal permitted by Rule 4 of the Federal Rules of Appellate Procedure. There was no prohibition against extending the time for the filing of a notice of appeal beyond the fourteen-day period authorized by the rule once a timely application to reopen has been filed.

Fourth, respondent should be estopped from claiming that this appeal was untimely. The only reference to untimeliness was a passing reference in the brief filed by appellee. At no time did respondent object in the District Court to either the filing of petitioner's motion to reopen the time for filing the appeal nor did he object to the District Court's granting of that motion. This situation would be governed by ***Thompson v. INS***, 375 U.S. 384 (1964), where an untimely motion for a new trial was accepted by the district court. The government did not object to the timeliness of that motion.

In this case respondent did not object to either the filing of petitioner's motion in the District Court nor the ruling by the District Court. Moreover respondent did not appeal the ruling by the District Court. Respondent should not be allowed to benefit from sitting back, saying nothing, and obliquely alluding in his brief that the Court of Appeals should dismiss the appeal. This is a form of judicial estoppel. This allowed respondent to assert two inconsistent positions. This was improper, under the judicial estoppel doctrine whose"... **purpose is 'to protect the judicial process,' ... 'by prohibiting parties from deliberately changing positions according to the exigencies of the moment, '...'** ***New Hampshire v. Maine***, 532 U.S. 368, 749-50 (2001). This applies to the government and

is applicable in a single proceedings. ***United States v. Owens***, 54 F.3d 271, 275 (6th Cir. 1995); ***United States v. McCaskey***, 9 F.3d 368, 378-79 (5th Cir.1993).

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KeithBowles.Certiorari06

No. 04-3262

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

APR 21 2006

LEONARD GREEN, Clerk

KEITH BOWLES,

Petitioner-Appellant,

v.

HARRY RUSSELL, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: BOGGS, Chief Judge; GIBBONS, Circuit Judge; and ROSE,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

*Hon. Thomas M. Rose, United States District Judge for the Southern District of Ohio, sitting by designation.

RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
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No. 06-5306

In the Supreme Court of the United States

KEITH BOWLES,

Petitioner,

v.

HARRY RUSSELL, Warden,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an appellate court may dismiss an untimely appeal that was improperly authorized by a district court, when the appellee has timely raised the argument that the appellant's notice of appeal was untimely.

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INTRODUCTION

This case, in which habeas petitioner Keith Bowles challenges the Sixth Circuit's dismissal of his appeal as untimely, does not warrant review, because the Sixth Circuit's decision involves a routine application of the strict notice of appeal deadlines set forth in Federal Rules of Appellate Procedure 3, 4(a)(6), and 26(b). Contrary to Bowles's assertions, the Sixth Circuit's decision does not conflict with or even implicate *Eberhart v. United States*, 546 U.S. 12, 126 S. Ct. 403 (2005), as the Sixth Circuit properly distinguished *Eberhart* on two grounds. Also contrary to Bowles's assertion, the Sixth Circuit's decision does not conflict with the Court's precedent permitting deadline flexibility under narrowly prescribed "unique circumstances." Indeed, it is Bowles's interpretation of the unique circumstances doctrine that conflicts with Court precedent, as it would create an exception that swallowed the rule. Finally, the Sixth Circuit's decision is correct on the merits.

The decision below was a straightforward application of the mandatory deadlines set forth in the Federal Rules of Appellate Procedure (the "Rules"). Rule 3 permits a party to take an appeal of right from a district court to a court of appeals "only by filing a notice of appeal with the district clerk within the time allowed by Rule 4." Rule 4 gives a party thirty days from the district court's judgment to file a notice of appeal, but creates exceptions to this deadline in specific circumstances. Relevant to this case, Rule 4(a)(6) permits the district court to "reopen the time to file an appeal for a period of 14 days" if a party failed to receive the proper notice from the district court of the entry of the judgment. Rule 26(b) prohibits district courts from extending the time to file a notice of appeal "except as authorized in Rule 4." The district court improperly granted Bowles an extension of more than fourteen days under Rule 4(a)(6), and

Bowles filed his notice of appeal on the sixteenth day. In his brief to the Sixth Circuit, the Warden argued that Bowles's appeal should be dismissed for lack of jurisdiction because his notice of appeal was untimely. The Sixth Circuit properly credited the Warden's argument and dismissed Bowles's appeal. The case is simple, and Bowles's efforts to find conflict and confusion fail.

Bowles cannot demonstrate any conflict between the decision below and the Court's decision in *Eberhart*. The Sixth Circuit distinguished *Eberhart* on two grounds. First, unlike the appellee in *Eberhart*, the Warden never forfeited his argument that Bowles's appeal was untimely. The Warden explicitly raised the issue in the jurisdictional statement of his appellate brief. Second, the Sixth Circuit noted that the Federal Rules of Appellate Procedure governing when an appeal may be taken, unlike the Federal Rules of Criminal Procedure at issue in *Eberhart*, may be characterized as a "prescription[] delineating the classes of cases" falling within federal appellate courts' jurisdiction. See Pet. App. 14 n.1 (citing *Kontrick v. Ryan*, 540 U.S. 443 (2004)). Thus, the court added that even if the appellee had forfeited his timeliness argument, *Eberhart* did not alter the court's responsibility to police its own jurisdiction and to dismiss untimely appeals. Pet. App. 13-14 & n.1.

Insofar as *Eberhart* leaves open the question whether Rule 4(a) is jurisdictional or not, the question is not ripe for the Court's review. Bowles's case does not offer a proper vehicle for examining whether notice of appeal deadlines are jurisdictional or subject to forfeiture, because here no forfeiture occurred, making the issue irrelevant. For the same reason, circuit courts that have identified the issue have found no need to answer it. Of the handful of courts offering analysis on the issue, all have reached the same conclusion as the Sixth Circuit.

Bowles also cannot demonstrate any conflict between the decision below and the other Court cases he cites, including *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) and *Thompson v. INS*, 375 U.S. 384 (1964). The Sixth Circuit properly cited *Harris Truck* and its progeny and discussed at length the appropriate rule of law. The Sixth Circuit then properly applied the narrow unique circumstances doctrine to the facts of Bowles's case by concluding that no such unique exception excused Bowles's untimely appeal. Bowles's argument—namely, that he falls into an exception contemplated by *Harris Truck* and *Thompson*—must fail, because excusing untimeliness whenever a district court improperly calculates a notice of appeal deadline would render Rule 26(b) a dead letter.

Finally, Bowles's miscellaneous arguments that the Sixth Circuit erred in applying Rule 4(a)(6) do not warrant the Court's attention, because they are unsupported by any authority, contradict the plain language of the Rule, and in any event do not justify review here.

In sum, Bowles has not identified any reason, compelling or otherwise, for the Court to review the case. Bowles's assertions that the decision below conflicts with Court precedent are false. Bowles's petition for certiorari reduces to a complaint of ordinary error by the circuit court in a case where no error occurred. The Court should deny the petition.

COUNTERSTATEMENT OF THE CASE

An Ohio jury convicted Petitioner Keith Bowles of murder for his participation in a group beating of an unarmed victim; the beating led to the victim's death. See Pet. App. 12. After exhausting his opportunities for direct appeal in state court, Bowles filed a federal petition for a writ of habeas corpus. *Id.* The case was assigned to a magistrate judge, who issued a report and recommendation that the petition be denied. *Id.* Bowles objected to the report. *Id.* The district

court adopted the magistrate judge's report and recommendation and denied Bowles a certificate of appealability. Pet. App. 20-22. Bowles moved for a new trial under Rule 59 or to amend the judgment under Rule 52. The district court entered the final appealable order denying both of Bowles's motions on September 9, 2003.

Over three months after the final order, on December 12, 2003, Bowles moved to vacate the district court's September 9 order and to reopen the appeal period pursuant to Federal Rule of Appellate Procedure 4(a)(6). He argued that he was never served the order and that he was not aware of the final appealable order against him until December 5, 2003. In a marginal order entered February 10, 2004, the district court denied his motion to vacate and granted his motion to reopen time for appeal. Under Rule 4(a)(6), the district court may reopen the time to appeal for a period of fourteen days. Despite this fourteen-day limit, the district court order gave Bowles seventeen days, or until February 27, 2004. See Pet. App. 23.

Bowles filed his notice of appeal on February 26, 2004, sixteen days after the district court granted his motion to reopen the appeal period. Noting that Bowles's notice of appeal fell outside of the fourteen-day window permitted under 4(a)(6), the clerk's office of the Sixth Circuit issued an order to show cause why the appeal should not be dismissed as untimely. Bowles responded that he had relied upon the district court's order, which said that he could file his response up to and including February 27, 2004.

On April 26, 2004, a three-judge panel of the Sixth Circuit dismissed Bowles's appeal for lack of jurisdiction, noting that "[c]ompliance with Fed. R. App. P. 4(a) is a mandatory and jurisdictional prerequisite." Although the court dismissed Bowles's appeal as to the district court's denial of his petition for a writ of habeas corpus and its denial of his motion for a new

trial or to alter or amend the judgment, the court inexplicably concluded that "[t]he appeal was timely filed as it applies to the February 10, 2004 ruling." The February 10 ruling was the order denying Bowles's motion to vacate and granting Bowles's motion to reopen the time for appeal, an order that Bowles's notice of appeal did not purport to be appealing. Next, by order dated September 8, 2004, the court construed Bowles's appeal as an application for a certificate of appealability, and denied the application.

Bowles moved for reconsideration, arguing the merits of his habeas claims but ignoring his procedural default. The court did not request a response from the Warden. On December 28, 2004, a new three-judge panel—apparently unaware of the first panel's conclusion that Bowles's appeal was procedurally barred—granted Bowles a certificate of appealability on one of his habeas issues.

The parties completed briefing on April 25, 2005. In the Warden's jurisdictional statement in his brief to the Sixth Circuit, he argued that the court lacked jurisdiction over the appeal due to Bowles's untimely notice of appeal. Indeed, the Warden devoted pages 1 to 4 of his brief to the lack of jurisdiction. Thus, Bowles is flat wrong when he says that the the Warden made only a "passing reference" to untimeliness in his brief and only "obliquely allud[ed]" to dismissal of the appeal. See Pet. Br. 7. It is Bowles, not the Warden, who failed to discuss the issue in his briefs to the appellate court. See Pet. App. 13.

The case was submitted on the briefs. On October 31, 2005, after briefing was completed but before the panel issued its decision, the Court decided *Eberhart v. United States*, clarifying the distinction between certain inflexible claim-processing rules and prerequisites of subject matter jurisdiction. The Sixth Circuit filed its opinion dismissing

Bowles's appeal on December 28, 2005, in which it acknowledged and distinguished *Eberhart* in a footnote. The court of appeals denied Bowles's petition for rehearing and rehearing en banc. Pet. App. 9. Bowles's petition for certiorari followed.

REASONS FOR DENYING A WRIT OF CERTIORARI

The Petition should be denied, because, contrary to Bowles's assertions, the Sixth Circuit's decision does not conflict with the Court's precedent. This case does not involve the same type of procedural rule at issue in *Eberhart*, and in any event, does not involve government forfeiture of the relevant procedural argument. The Sixth Circuit also properly applied the Court's precedent in declining to find that a unique circumstance excused Bowles's untimely appeal. Finally, the decision below is correct on the merits, so there is no reason to disturb it.

A. The decision below does not conflict with, or even implicate, the Court's decision in *Eberhart*.

Bowles incorrectly asserts that the Sixth Circuit decision conflicts with *Eberhart v. United States*, 126 S. Ct. 403 (2005). But the Sixth Circuit properly cited *Eberhart* and considered its application to Bowles's case. But, as the appeals court noted, *Eberhart*'s holding is not implicated here for two reasons:

1. The Warden did not forfeit his argument that Bowles's appeal was untimely.

Bowles falsely asserts that the Sixth Circuit "sua sponte" dismissed his appeal as untimely. In fact, the court's discussion of Bowles's untimely filing was not sua sponte. Instead, the court analyzed the timeliness argument raised by the Warden. Thus, the case does not even present the question that Bowles poses: "whether an appellate court may sua sponte dismiss an appeal . .

. ." Pet Br. at i (emphasis omitted). More significantly, the Warden's timely raising of the deadline argument makes *Eberhart* inapposite.

In *Eberhart*, the Court held that arguments pertaining to certain inflexible claim-processing rules are not properly considered "jurisdictional," and thus may be forfeited by a party's failure to timely assert them. 126 S. Ct. at 405-07. The government had opposed a party's motion under Fed. R. Crim. P. 33 for a new trial on the merits, but then objected to the motion as untimely only after the district court had granted the motion on the merits. Because the government forfeited its untimeliness argument, and because the court of appeals could not sua sponte dismiss on account of the nonjurisdictional Rule 33 violation, the Court ordered the appeal remanded for consideration on the merits. *Id.* at 407. *Eberhart* admonished courts that "failure to object to untimely submissions entails forfeiture of the objection." *Id.* at 406.

The Sixth Circuit's decision in no way conflicts with *Eberhart*. Although the Sixth Circuit's opinion speaks of lacking "jurisdiction," see Pet. App. 19, the terminology is irrelevant where, as here, the untimeliness issue was raised by the party and not sua sponte by the court. The Sixth Circuit observed that the Warden's brief properly included an objection to the timeliness of Bowles's appeal, and that the government "did not, nor did it need to, oppose Bowles's Rule 4(a)(6) motion in the district court." Pet. App. 14 n.1. Because forfeiture was not an issue here, the Sixth Circuit correctly concluded that *Eberhart*'s claim-processing-versus-jurisdictional distinction would not affect the outcome of Bowles's case. Thus, Bowles's fundamental disagreement with the Sixth Circuit's decision is not the meaning of *Eberhart*, but rather the conditions of forfeiture.

Bowles offers no rationale for why the Sixth Circuit's fact-sensitive forfeiture determination is an issue appropriate for the Court's review. Even if the Court were inclined to review appellate courts' conclusions regarding forfeiture, the Sixth Circuit committed no error. The Sixth Circuit properly concluded that the Warden was under no obligation to raise the untimeliness argument any sooner than his brief on appeal. Bowles offers no argument or authority to support his theory that the Warden was obligated to object to Bowles's untimely filing before it even occurred.

2. The rule barring untimely appeals from a district court to a court of appeals is jurisdictional in nature.

In *Eberhart*, the Court reemphasized its instruction in *Kontrick v. Ryan* that the label "jurisdictional" should apply only "for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." See 126 S. Ct. at 405. Mere "claim-processing" rules, by contrast, are not jurisdictional. *Id.* Specifically, the Court classified Federal Rules of Criminal Procedure 33 and 45(b)(2) as nonjurisdictional claim-processing rules. *Id.* These rules combine to bar a district court from entertaining a motion for a new trial filed more than seven days after the guilty verdict, except motions based on newly discovered evidence.

In contrast, the rules implicated in Bowles's case combine to restrict the time in which a party may take an appeal to a court of appeals. See Fed. R. App. P. 3, 4(a)(6), and 26(b). The Sixth Circuit observed that, unlike the rules at issue in *Eberhart*, these rules were part of legislation passed by Congress to limit the jurisdiction of federal appellate courts. See Pet. App. 14 n.1 (citing Act of December 9, 1991, Pub. L. 102-198, § 12, 105 Stat. 1623, 1627 ("the

district court may . . . reopen the time for appeal for a period of 14 days . . . .")). Thus, the Sixth Circuit concluded, "we think that Rule 4(a)(6) is, in fact, 'a prescription[] delineating the classes of cases that we may hear,'" See Pet. App. 14 n.1 (quoting *Kontrick*, 540 U.S. at 455). The Sixth Circuit's interpretation of how *Eberhart* and *Kontrick* should apply to a *different* procedural rule cannot constitute a direct conflict with *Eberhart*, and Bowles's argument that such a conflict exists clearly fails.

Even if the Court sought to clarify whether Rule 4(a) is jurisdictional or a mere claim-processing rule, this is a poor case in which to do so. Most importantly, this case does not present the issue, because the lack of government forfeiture ensures that the jurisdictional/nonjurisdictional distinction is not outcome-determinative. Whatever mistaken assumption the Sixth Circuit panel may have held regarding the jurisdictional nature of Bowles's procedural default, it is irrelevant to the case's disposition.

Furthermore, no conflict exists among the circuit courts. The Court decided *Eberhart* less than a year ago. Since then, the circuits have had little opportunity to apply it in circumstances in which the jurisdictional question mattered. For the most part, courts faced with the question of whether 4(a) is jurisdictional have found no need to answer it, either because they found no error in the rule's application, see *Touchstone Marketing Inc v. Qwest Communications*, No. 05-2935-cv, 2006 Lexis 10163, at *3 n.1 (2d Cir. Apr. 19, 2006), *In re Special Grand Jury*, 450 F.3d 1159, 1166 (10th Cir. 2006), or because the appellee had not forfeited the Rule 4(a) argument, see *United States v. Carelock*, No. 05-3515, 2006 Lexis 21220, at *7 n.6 (3d Cir. Aug. 18, 2006). Furthermore, those few courts that have attempted to answer the question of Rule 4(a)'s jurisdictional status, either in holding or dicta, have reached the same conclusion

that the Sixth Circuit did here. See *Demorest v. Ryan*, 156 F. App'x 931 (9th Cir. 2005) (holding); *Carelock*, 2006 Lexis 21220, at *7 n.6 (dicta). There is no conflict for the court to resolve, and the Court should allow the circuits more opportunity to apply *Eberhart* before revisiting it.

B. The decision below does not conflict with *Thompson*, *Harris Truck*, or *Osterneck* in its application of the unique circumstances doctrine to the facts of this case.

Bowles incorrectly alleges that the Sixth Circuit's strict enforcement of the Rule 4(a) deadlines conflicts with the Court's decisions in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) and *Thompson v. INS*, 375 U.S. 384 (1964). The Court in both of these cases applied a "unique circumstances" exception to permit deviation from otherwise hard-and-fast procedural rules. Bowles implies that the Sixth Circuit failed in its efforts to distinguish the facts of *Harris Truck Lines*. Pet. Br. 5. Bowles also claims that his situation is "governed" by *Thompson* because the Court there excused a district court's grant of an untimely motion for a new trial where the government failed to object to the untimeliness of the motion. Pet. Br. 7. Bowles is incorrect in his reading of both cases.

In *Harris Truck*, the Court first articulated the principle that has become known as the "unique circumstances" doctrine. The district court had extended the appellant's time for filing a notice of appeal because it found "excusable neglect or good cause," as explicitly permitted by the federal rules. The Seventh Circuit dismissed the appeal, finding that the circumstances did not, in fact, amount to excusable neglect, and that the appeal was therefore untimely. The Supreme Court reversed, noting:

> In view of the obvious great hardship to a party who relies upon the trial judge's findings of "excusable neglect" prior to the expiration of the 30-day period and

> then suffers reversal of the finding, it should be given great deference by the reviewing court.

371 U.S. at 217.

Bowles's appeal is untimely not because of any judicial error in evaluating what constitutes excusable neglect, but because Bowles missed a clear procedural deadline. Unlike the appellant in *Harris Truck*, Bowles did not need to rely upon an assurance from the court: Calculations of deadlines, unlike determinations of excusable neglect, do not turn on the exercise of judicial discretion. Bowles could have calculated the relevant deadline under the rules regardless of any representation by the district court. Furthermore, unlike in *Harris Truck*, the district court action here did not turn on a "finding" entitled to the Sixth Circuit's deference, because the proper calculation of deadlines is governed entirely by the Rules and needs no judicial finding. In short, *Harris Truck* does not control the outcome of Bowles's appeal, and the Sixth Circuit's decision in no way conflicts with *Harris Truck*.

The facts of *Thompson* likewise do not control Bowles's case. In *Thompson*, the government failed to object to the timeliness of the petitioner's post-trial motions until the court had already ruled on the merits of the motions. On appeal, the government then attempted to retroactively challenge the timeliness of an already completed proceeding in order to attack the timeliness of the subsequent proceeding, the date of which had been calculated based upon the assumption that the prior proceeding had been legitimate. See 375 U.S. at 385. The Court ruled that, as in *Harris*, "the petitioner did an act which, if properly done, postponed the deadline for the filing of his appeal," and "the District Court concluded that the act had been properly done." The Court therefore vacated the court of appeals's judgment dismissing the appeal and remanded for determination on the merits. *Id.* at 387. Here, unlike the appellee in *Thompson*, the

Warden did not wait until the untimely proceeding was complete before challenging its untimeliness. As noted above, the Warden properly argued the untimeliness of Bowles's appeal in his appellate response brief.

Bowles fails to cite the Court's more recent precedent governing the unique circumstances doctrine: *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179 (1989). In *Osterneck*, the Court clarified that the unique circumstances exception is to be strictly construed, and that it "applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurances by a judicial officer that this act has been properly done." *Id.* at 179. *Osterneck* demonstrates that the Sixth Circuit's opinion is not at odds with Supreme Court precedent. Given that *Osterneck* instructs lower courts to apply the unique circumstances exception sparingly, the decision below cannot be said to conflict with *Harris Truck* or *Thompson* merely because it failed to extend those cases to a new factual circumstance.

As Bowles himself notes, the decision below properly cited *Harris Truck*. It also properly cited *Thompson* and *Osterneck*. The Sixth Circuit carefully reviewed these cases and applied the rules set forth in them. See Pet. App. 15-17. Thus, Bowles's true complaint is not with any conflict between the decision below and Court precedent, but rather with the Sixth Circuit's factual application of a properly stated rule of law.

Even if incorrect application of a proper rule of law warranted the Court's review, see Sup. Ct. R. 10, such review would be unneeded here, as the Sixth Circuit did not err in its application. The Sixth Circuit correctly noted that the incorrect deadline supplied by the court could not fall within the unique circumstances exception under *Osterneck*, because the

seventeen-day extension to file a notice of appeal is not an act that could ever be "properly done," as the language of Rules 4(a)(6) and 26(b) make clear. See Pet. App. 15-17.

The decision below is consistent with the Eleventh Circuit's approach in *Pinion v. Dow Chem., U.S.A.*, 928 F.2d 1522, (11th Cir. 1991). In *Pinion*, the court, noting "*Osterneck's* strict construction of the 'unique circumstances' exception," refused to grant relief to a party who relied upon a district court's order giving an extension of time for filing a post-trial motion, an order that was prohibited under the Rules. *Id.* at 1534. The Eleventh Circuit reasoned that the party was not reasonable in relying upon a district court's improper action "in spite of the explicit language of [the] Rule." *Id.* at 1532-33. In Bowles's case, just as in *Pinion*, "[t]he reasonableness of [the party's] reliance on the action of the district court is severely undercut by the ease with which it could have read [the Rule]. Simply scanning the Rule would have provided notice that there was an inconsistency between the Rule's text and the court's consent order." *Id.* at 1534.

The Third Circuit, likewise, has denied relief when a party relied upon a district court's minute order granting an extension of time to file a Rule 59(e) motion. See *Green v. Bisby*, 869 F.2d 1070, 1072 (7th Cir. 1989). The court of appeals in *Green* noted that "*Osterneck*'s strict construction of the 'unique circumstances' doctrine may occasionally produce a harsh result when an erroneous extension has been granted," but observed that, to avoid future harsh results, the appellate court was emphasizing to district courts the meaning of the relevant Rule. *Id. See also Kraus v. Consolidated Rail Corp.*, 899 F.2d 1360, 1365-66 (3d Cir. 1990) ("The unique circumstances doctrine has never been extended to an attorney's miscalculation of the

applicable time limits, and we see no reason to do so here even if the trial judge also shared that incorrect assumption.").

The Fourth Circuit and Tenth Circuit have also focused on the "properly done" language of *Osterneck*, and refused to permit an untimely filing authorized by the district court where such an action can "never be 'properly done.'" See *Panhorst v. United States*, 241 F.3d 367, 372-73 (4th Cir. 2000); *Weitz v. Lovelace Health Sys., Inc.*, 214 F.3d 1175, 1180 (10th Cir. 2000). In both cases, the court stressed that litigants have a duty to familiarize themselves with the relevant Rules, and that if the appellant had done so he could have easily avoided the filing error at issue. *Panhorst*, 241 F.3d at 372-73; *Weitz*, 214 F.3d at 1180. The Tenth Circuit emphasized that "the mere fact that a court has granted . . . an extension does not justify reliance that is clearly at odds with the text of the rules." *Id.* It added:

> It makes great practical sense to require the parties to comply with clearly mandated requirements in the Federal Rules. Otherwise, we would be encouraging litigants to invite courts to commit easily avoidable errors. District courts today suffer under a burdensome caseload, and a certain degree of cooperation and assistance from litigants is essential to the judicial system's effective operation.

Id.

Bowles relies solely upon the alleged conflict between the decision below and the Court's precedent, and he does not even allege a circuit split in the application of *Harris Truck* and its progeny. The Warden observes that some courts of appeals have acknowledged differences in how broadly courts apply the unique circumstances exception. See, e.g., *United States v. Heller*, 957 F.2d 26 (1st Cir. 1992) (noting "some disagreement among the circuits about the scope of the doctrine"); *Pinion*, 928 F.2d at 1529-31 (collecting cases). However, the variations among and within courts in their applications of the law do not rise to the level of a conflict on the

meaning of the law. The language of *Osterneck* is clear in its instruction to apply the unique circumstances doctrine narrowly, and the Sixth Circuit properly did so.

Even if the Court were inclined to revisit or further clarify *Osterneck*, this case provides a poor opportunity to do so. Whatever the outer boundaries of the unique circumstances exception might be, they do not extend to a case such as this, in which the district court committed an error of arithmetic that would be obvious to any attorney who had consulted the relevant Rules. A district court's mistaken extension of a deadline beyond what the Rules allow cannot constitute an exceptional circumstance, since such an exception would vitiate the rule set forth in Fed. R. App. P. 26(b) that "the court may not extend the time to file a notice of appeal." *Cf. Bailey v. Sharp*, 782 F.2d 1366, 1371 (7th Cir. 1986) (Easterbrook, J., concurring) (noting, in context of a different rule, that "[u]nless every effort to extend the time is a 'special circumstance' justifying the extension—in which event Rule 6(b) is a dead letter, each violation a self-fulfilling prophecy—the district court's order . . . had no effect"). If a district court's enlargement of an appeal window in contravention of Rule 26(b) were a "unique circumstance," then Rule 26(b) would be meaningless: Courts would be free to violate the prohibition against extending appeal deadlines by simply ignoring it, knowing that any improper order would be immune from review once an appealing party had "relied" upon it.

C. The decision below was correct on the merits.

Bowles also insists that the Sixth Circuit committed miscellaneous errors in rejecting his untimely appeal. But he is wrong. So even if simple error satisfied the Court's criteria for certiorari review, see Sup. Ct. R. 10, none of Bowles's arguments of error has merit.

Bowles insists that "the court misread the rules of appellate procedure governing extensions of time." Pet. Br. 6. He argues, without support, that "[t]he 180 day time limit is the only time that cannot be extended." *Id.*

The unambiguous language of the rules contradicts Bowles's assertion. Rule 26(b) expressly prohibits extensions of time to file an appeal other than "as authorized in Rule 4." Rule 4, in turn, expressly limits the reopening of the time to file an appeal to a period of fourteen days. See Fed. R. App. P. 4(a)(6). The plain language cannot be reconciled with Bowles's assertion that the fourteen-day extension set forth in Rule 4 is flexible or open to district court enlargement. See also *United States ex rel. McAllan v. City of New York*, 248 F.3d 48, 52-53 (2d Cir. 2001) (noting that district court does not have authority to extend fourteen-day time period under Rule 4(a)(6)).

Bowles's further argument is also mistaken. Bowles says that, even if the Sixth Circuit properly interpreted the procedural rule at issue, it applied the wrong "remedy." Bowles argues that he was entitled to a remand to the district court, where the district court could vacate its mistaken order and enter a new order that properly calculated Bowles's fourteen-day deadline. Pet. Br. 6. But Bowles cites no authority for his proposed solution, which cannot be reconciled with the statute's language. Rule 4(a)(6) requires that any motion to reopen be filed within 180 days of judgment or within seven days after receiving notice of the judgment, whichever is earlier. By the time the Sixth Circuit issued its opinion on the merits of Bowles's appeal, more than two years had passed since both the district court's final appealable order and Bowles's receipt of notice. Any remand from the circuit court would not have cured the fact that any properly-calculated deadline for Bowles's appeal has already long passed.

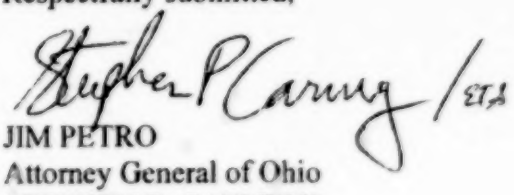
Finally, Bowles misses the mark in his reliance upon *New Hampshire v. Maine*, 532 U.S. 742 (2001), and in his insistence that the doctrine of judicial estoppel applies here. The Warden did not assume one position and later adopt a different one, as the Warden has never argued that Bowles's notice of appeal was timely. Nor did the Warden "sit[] back, say[] nothing, and obliquely allud[e] in his brief" to the untimeliness of Bowles's appeal, as Bowles alleges. Pet. Br. 7. On the contrary, as explained above, the Warden properly raised the deadline issue in his merits brief to the court of appeals.

In short, the decision below was correct, and does not warrant review.

CONCLUSION

For the above reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,



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November 9, 2006

No. 06-5306

In the Supreme Court of the United States

KEITH BOWLES,

Petitioner,

v.

HARRY RUSSELL, Warden,

Respondent.

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All persons required to be served have been served.

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Re: *Keith Bowles v. Harry Russell, Warden*
Case No. 06-5306

Dear Mr. Suter:

Enclosed are ten (10) printed copies of the Respondent's Brief in Opposition to Petition for a Writ of Certiorari.

The certificate of service is also enclosed.

Respectfully yours,

JIM PETRO
Attorney General of Ohio

Stephen Carney

STEPHEN P. CARNEY
State Solicitor

SPC:am
Enclosure

No. 06-5306

IN THE

Supreme Court of the United States

Keith Bowles,

Petitioner,

v.

Harry Russell,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether an appellate court may sua sponte dismiss an appeal which has been filed within the time limitations authorized by a district court after granting a motion to reopen the appeal time under Rule 4(a)(6) of the Federal Rules of Appellate Procedure.

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INTEREST OF *AMICUS CURIAE*

National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia nonprofit corporation with a membership of more than 10,000 attorneys nationwide, along with eighty state and local affiliate organizations numbering 28,000 members in fifty states. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge of the law in the area of criminal justice and practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases in the state and federal courts. Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice.[1]

STATEMENT

The Federal Rules of Appellate Procedure permit a district court to reopen the time for a party to file an appeal for a period up to fourteen days in certain specified circumstances. In this case, it is undisputed that the district court properly reopened the time for taking an appeal and that petitioner filed a notice of appeal within the time permitted by the district court's order. It is further uncontested that the Government never objected in the district court to the amount of time the court gave petitioner to file his appeal, even though the order gave petitioner three more days than is permitted by the rule. The question in this case is whether the court of appeals was correct in holding that it lacked jurisdiction to consider petitioner's appeal because although

---

[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored any part of this brief, and no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief.

petitioner's notice of appeal was filed in compliance with the district court's order, the district court's order was not in compliance with the Rules.

1. Federal Rule of Appellate Procedure 4 governs the time limits for filing notices of appeal. Subsection (a)(1)(A) of that rule provides that in "a civil case...the notice of appeal...must be filed with the district clerk within 30 days after the judgment or order appealed from is entered." That time limit is subject to exception under two provisions of the Rule. Subsection (a)(5) permits a party to seek from the district court an extension of time to file the notice of appeal, so long as the motion is filed no later than 30 days after the notice of appeal was due and the party shows excusable neglect or good cause. Fed. R. App. P. 4(a)(5)(A). Rule 4(a)(6) provides an additional exception:

> The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:
>
> (A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;
>
> (B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and
>
> (C) the court finds that no party would be prejudiced.

All of these provisions are codified at 28 U.S.C. § 2107.

2. Petitioner Keith Bowles was convicted in Ohio of felony-murder and sentenced to fifteen years to life in prison. *Bowles v. Russell*, 432 F.3d 668, 669 (2005). After exhausting his state appeals, petitioner filed for a writ of habeas corpus. Acting upon the recommendation of a

magistrate judge, the district court dismissed the petition and denied a certificate of appealability. *Id.* at 670. Bowles then moved for a new trial or to amend the judgment, which tolled the time for filing a notice of appeal until the motion was denied on September 9, 2003. *See id.*; Fed. R. App. P. 4(a)(4)(A). At that time, under Rule 4(a)(1), petitioner was required to file a notice of appeal by October 9, 2003. It is undisputed, however, that petitioner's counsel did not receive notice of the judgment. *Id.* Counsel finally became aware of the judgment when he checked a docket sheet on December 3, 2003. *Id.* In accordance with Rule 4(a)(6), counsel filed a timely motion to reopen the time for appeal. The motion did not request an extension of time of any particular length or specify a date upon which the notice of appeal should be due if the motion were granted. *See* Motion to Vacate and Reopen Time to Appeal.

On February 10, 2004, the district court granted petitioner's motion. 432 F.3d at 670. Under the Rule, the district court was authorized to reopen the time to appeal for up to fourteen days from the entry of the order granting the motion, which would have been February 24, 2004. However, for reasons undisclosed in the record, the court extended the deadline for an additional three days as well, ordering that petitioner was entitled to file his notice of appeal by February 27, 2004.[2]

Although the order exceeded the district court's authority under the Rule, and although all parties were served with the order, the Government did not object to the order or otherwise inform petitioner or the district court of the error. *See id.* at 671 n.1. Petitioner's counsel subsequently filed a notice of appeal on behalf of his client on February 26, 2004, within

---

[2] *Cf.* Fed. R. App. P. 26(c) ("When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service.").

the time permitted by the court's order, but two days beyond the maximum extension permitted by the rules.

3. After docketing the appeal, the Sixth Circuit issued an order to show cause why the appeal should not be dismissed as untimely. *Id.* at 671. After receiving petitioner's response, a motions panel found that "[t]he appeal was timely filed as it applies to the February 10, 2004 ruling" which reopened the time for appeal. *Id.* (alteration in original). A subsequent panel then denied the certificate of appealability, a decision reversed by a different panel upon petitioner's motion for reconsideration. *Id.*

The merits panel then dismissed the appeal as untimely. The court first concluded that the failure to file a notice of appeal within the time permitted by the rules deprives a court of appeals of subject-matter jurisdiction. *Id.* at 673. Accordingly, the court held that it lacked authority to proceed with the appeal even if the notice of appeal was filed in reliance upon an order of the district court. *Id.* The court acknowledged that several decisions of this Court might "counsel a contrary" result. *Id.* The court thus recognized that in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam), this Court unanimously reversed the dismissal of an untimely appeal where the appellant filed his notice of appeal within the time permitted by a district court's erroneous order extending the appeal deadline. *See* 432 F.3d at 673-75. The Sixth Circuit likewise acknowledged that in *Thompson v. INS*, 375 U.S. 384 (1964) (per curiam), the Court ordered that the circuit court hear an appeal filed outside the time permitted by the Rules where the trial court erroneously assured the appellant that a post-trial motion was timely filed and would thus toll the time to file the appeal. 432 F.3d at 674-75.

The court of appeals nonetheless held that the "unique circumstances" doctrine established by these decisions did not apply to this case. *Id.* at 675. The court noted that in *Thompson*, the appellant had been misled regarding the effect of a motion which, if timely filed, would *postpone* the time

for filing an appeal, whereas in this case, petitioner had been misled regarding the length of a *reopened* appeal period. *Id.* The court further distinguished the cases on the ground that the untimely filing in *Thompson* arose originally from the *party's* error, which the court later ratified, whereas the untimely filing in this case arose originally from the *court's* error. *Id.* The court concluded from this fact that the "unique circumstances" doctrine "operates to excuse neglect on the part of the litigant, not on the part of the court." *Id.* The court accordingly dismissed the appeal for lack of jurisdiction.

This Court granted certiorari on December 11, 2006.

SUMMARY OF ARGUMENT

The Sixth Circuit's decision in this case is wrong on two accounts. First, it erroneously construed the time limits for filing a notice of appeal as affecting the court's subject-matter jurisdiction to adjudicate petitioner's appeal. That error led to the second: dismissing the appeal even though it was filed within the time limits authorized by the trial judge in an order to which the Government made no objection in the district court. Both errors should be corrected by this Court and petitioner's appeal should be reinstated.

Federal Rule of Appellate Procedure 4(a), and the corresponding statutory provision 28 U.S.C. § 2107, properly understood, are not jurisdictional provisions but instead merely mandatory claim-processing rules the violation of which may be overlooked in certain circumstances. The subject-matter jurisdiction of the court of appeals is defined by 28 U.S.C. §§ 1291-1292, which establish the class of cases falling within the circuit courts' adjudicatory authority in terms of the finality of a district court's judgment and without reference to the time limits for filing a notice of appeal. Those time limitations are, instead, separately codified in 28 U.S.C. § 2107 and Federal Rule of Appellate Procedure 4(a), neither of which purport to limit the courts' jurisdiction. While the deadlines in those provisions are mandatory and

strictly enforced, they are not conditions on the jurisdiction of the courts of appeals.

Even if this Court considered the basic filing deadlines of Rule 4(a) – *e.g.*, the thirty-day limit for filing a notice of appeal or the 180-day limit for filing a motion to reopen the time for filing an appeal – to be jurisdictional, there is no reason to conclude that the separate provisions limiting the authority of the district court to grant extensions of time are also matters of jurisdictional significance. This Court has never held, for example, that the circuit courts have on obligation to review sua sponte whether the district court correctly determined that the predicate for an extension of time (*e.g.*, excusable neglect or reasonable cause) exists in every case in which an extension is granted, even if the opposing party never objected to the extension in the trial court or conceded the issue on appeal. The fourteen-day limit in Rule 4(a)(6) likewise is a nonjurisdictional restriction on the authority of the court to extend the time for filing an appeal, not a limitation on the subject-matter jurisdiction of the court of appeals.

Because the time limits of Rule 4(a) in general, and the fourteen-day limit in Rule 4(a)(6) in particular, are not jurisdictional, they are subject to excuse and forfeiture in appropriate circumstances. Although the district court clearly erred in permitting petitioner to file a notice of appeal more than fourteen days after the court issued its order, that error should not result in the dismissal of petitioner's appeal, for two related reasons.

First, this Court has recognized that dismissal is appropriate in the "unique circumstances" that arise when a party submits an untimely notice of appeal in reliance upon erroneous assurances or orders from a district court indicating that the appeal would be timely when filed. *See, e.g.*, *Thompson v. INS*, 375 U.S. 384 (1964) (per curiam); *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962). While parties obviously have a duty to inform themselves of the requirements of the rules, it is not

unreasonable for a litigant to assume that the court will conform its orders to the requirements of the law and that taking an action permitted by court order will not result in the forfeiture of important rights, including the right of appeal. Such reliance is particularly understandable in the context of habeas litigation, where the rules are complex and the vast majority of petitioners proceed pro se. The "unique circumstances" doctrine plays an important role in balancing the judicial system's competing interests in compliance with procedural rules and ensuring the vindication of important constitutional rights.

Second, this Court has recognized that even strict claim-processing rules, like the time limits in Rule 4(a), are subject to forfeiture when a party fails to invoke them in a timely manner. *See, e.g., Eberhart v. United States*, 126 S. Ct. 403, 406 (2005). In this case, the Government had notice that the time permitted by the district court's order exceeded that permitted by the rules. It nonetheless failed to object to the order in the district court, even though doing so would have permitted the trial court to remedy the error, provided petitioner notice of the defect and a chance to file a timely appeal, and avoided the difficulties with which the court of appeals ultimately was forced to struggle in this case.

In these circumstances – where the appellant relies on a deadline set in a court order to which the appellee offered no objection in the district court – the timeliness objection is forfeited and dismissal is inappropriate.

Finally, even if this Court were to decide that the Sixth Circuit was required to dismiss petitioner's appeal for lack of jurisdiction, it should nonetheless make clear that the district court retains a limited authority to issue another Rule 4(a)(6) order reopening the time to file an appeal. Nothing in the rules precludes a district court from issuing a second order reopening the time to appeal in appropriate circumstances, a practice commonly permitted when appellants fail to perfect an interlocutory appeal under the procedures established in 28 U.S.C. § 1292(b). While such orders surely should be rare,

and their issuance subject to careful review by the courts of appeals, allowing a second reopening would be entirely appropriate in the unique circumstances of cases such as this.

ARGUMENT

I. The Time Limits Established By Federal Rule Of Appellate Procedure 4(a) And 28 U.S.C. § 2107, While Stringent, Are Not Jurisdictional.

The Sixth Circuit ruled that it lacked jurisdiction to hear petitioner's appeal because although petitioner filed his notice of appeal within the time permitted by the district court's order reopening the time for appeal under Fed. R. App. P. 4(a)(6), the district court exceeded its authority under that rule. The court of appeals' conclusion was incorrect, based in part on the misconception that the time limits in Rule 4(a) restrict the subject-matter jurisdiction of the circuit courts.

A. The Time Limits For Filing A Notice Of Appeal Do Not Affect The Court Of Appeals' Subject-Matter Jurisdiction.

1. From the beginning of the American judicial system, the subject-matter jurisdiction of the federal courts has been defined in terms of the types of cases a court may hear, rather than by reference to time limitations like those imposed in Fed. R. App. P. 4(a).

Nineteenth- and early-twentieth-century treatises explained that the first "essential" of subject-matter jurisdiction was "cognizance of the *class of cases* to which the one to be adjudged belongs." George W. Rightmire, CASES AND READINGS ON THE JURISDICTION AND PROCEDURE OF FEDERAL COURTS 1 (1917) (citation omitted) (emphasis added); John Downey Works, COURTS AND THEIR JURISDICTION: A TREATISE ON THE JURISDICTION OF THE COURTS OF THE PRESENT DAY, HOW SUCH JURISDICTION IS CONFERRED, AND THE MEANS OF ACQUIRING AND LOSING IT 20 (1894) (same). Or, as put by another treatise writer, "the abstract question of jurisdiction is whether the cause belongs

to the class named." Timothy Brown, COMMENTARIES ON THE JURISDICTION OF COURTS 6 (1891). This definition of subject-matter jurisdiction found its roots in the historical division of jurisdiction among the various courts of England. The early English judicial system was characterized by a proliferation of courts, each with distinct boundaries of authority. *See generally* Edward Coke, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; CONCERNING THE JURISDICTION OF COURTS (1648, ed. 1817). Those boundaries were drawn according to the nature of the claim and the subject of the litigation – quite literally, the "subject-matter" of the suit. For example, the Court of the Admiralty had jurisdiction over causes of action arising on the open seas, *id.* at 134, cases involving the misuse of heraldic arms were brought in the Court of Chivalry, *id.* at 123-29, and the Ecclesiastical Courts governed cases involving spiritual matters, *id.* at 321.

The tradition of defining courts' jurisdiction in terms of the classes of cases they were empowered to hear continued in the American courts, as illustrated by the division of law and equity courts in many early states, and by Article III of the federal constitution, which defined the judicial power of the United States by reference to the subject-matter of the litigation (*e.g.*, federal question or maritime jurisdiction) or the identity of the parties (*e.g.*, diversity jurisdiction). *See* U.S. Const. Art. III, § 2.

Following this pattern, Congress has long defined the subject-matter jurisdiction of the district court in terms of the subject-matter of the litigation or the identity of the parties. *See* 28 U.S.C. § 1331 (providing that the "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States"); *id.* § 1332 (establishing diversity jurisdiction). If the case is of the type described in Section 1331 or 1332, the district court has jurisdiction over the matter even if the plaintiff fails, for example, to bring the suit within the time limits established in

a statute of limitations. *See Day v. McDonough*, 126 S. Ct. 1675, 1681 (2006).

In the same way, the subject-matter jurisdiction of the federal circuit courts has always been defined by statute through reference to the class of cases to be reviewed – specifically, final judgments of the district courts and certain interlocutory orders – and not in terms of the timeliness of the notice of appeal. Thus, the statute creating the federal appellate courts in 1891 explicitly provided that "the circuit courts of appeals established by this act shall exercise *appellate jurisdiction* to review by appeal or by writ of error *final decision* in the district court...in all cases other than those provided [direct review in the Supreme Court]." Act of Mar. 3, 1891, ch. 517, § 6, 26 Stat. 826, 828 (emphasis added). That basic definition of appellate jurisdiction has changed little since that time. In its present form, 28 U.S.C. § 1291 continues to provide that "[t]he courts of appeals...*shall have jurisdiction* of appeals from all *final decisions* of the district courts of the United States" (emphasis added).[3]

The rules for processing appeals falling within the defined jurisdiction of the courts of appeals have always been separately codified without any reference to jurisdiction. Thus, in the original 1891 Act, the time for taking an appeal was defined in Section 11, which made no mention of jurisdiction (which was expressly defined in Section 6). *See* § 11, 26 Stat. at 829. Likewise today, the time for filing a notice of appeal is set forth in 28 U.S.C. § 2107 and reflected in Fed. R. App. P. 4(a), neither of which mentions jurisdiction or refers to the expressly jurisdictional provisions of 28 U.S.C. §§ 1291-1292.

2. Nonetheless, in recent times, the word "jurisdiction" has become "a word of many, too many, meanings." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1998) (citation omitted). As a result, "courts, including this

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[3] 28 U.S.C. § 1292 extends that jurisdiction to certain interlocutory orders as well.

Court...have been less than meticulous" in their usage of the term and have "more than occasionally used the term 'jurisdictional' to describe emphatic time prescriptions in rules of court," *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004), including the thirty-day time limit in Rule 4(a)(1). *See, e.g., Browder v. Director, Dep't of Corrs. of Ill.*, 434 U.S. 257, 264 (1978) (referring to time limit "as "mandatory and jurisdictional").

The Court has, however, recently undertaken to reduce the confusion and to restore the proper conception of subject-matter jurisdiction in the federal courts. Just last Term, the Court admonished that "[c]larity would be facilitated...if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Eberhart v. United States*, 126 S. Ct. 403, 405 (2005) (per curiam) (quoting *Kontrick*, 540 U.S. at 455). Claim-processing rules, the Court has been clear, may be "emphatic" but that does not make them jurisdictional. *Id.* at 406. *See, e.g., Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235, 1242 (2006) ("[T]ime prescriptions, however emphatic, are not properly typed 'jurisdictional.'" (internal quotation marks omitted) (quoting *Scarborough v. Principi*, 541 U.S. 401, 414 (2004))); *Carlisle v. United States*, 517 U.S. 416, 434 (1996) (Ginsburg, J., concurring) ("It is anomalous to classify time prescriptions, even rigid ones, under the heading 'subject-matter jurisdiction.'").

This Court has illustrated the distinction in recent cases rejecting claims that failure to comply with various deadlines in the federal rules were jurisdictional errors that could be raised at any point in the litigation. For example, in *Kontrick v. Ryan*, 540 U.S. 443 (2004), the Court held that a debtor forfeited any objection to the untimeliness of a creditor's complaint objecting to the discharge of a debt because the debtor failed to raise that objection before the complaint was

adjudicated on the merits.[4] This Court began by observing that the jurisdiction of the bankruptcy courts to hear objections to a discharge was expressly set forth in 28 U.S.C. § 157(b)(2)(J), which "contains no timeliness condition." 540 U.S. at 453. The time limits for filing objections, the Court explained, was instead typical of the kinds of "claim-processing rules that do not delineate what cases bankruptcy courts are competent to adjudicate." *Id.* at 454. For that reason, the untimeliness of the creditor's objection did not disturb the court's jurisdiction to consider the claim and the objection was subject to forfeiture. *Id.*

A year later, this Court reaffirmed its definition of jurisdictional rules in *Eberhart*, a case involving an untimely motion for a new trial under the Federal Rules of Criminal Procedure. As relevant to the case, the Rules required that the defendant file his motion "within 7 days after the verdict or finding of guilty." Fed. R. Crim P. 33(b)(2). The defendant filed a timely motion, but later attempted to supplement it outside the time permitted by the rule. The Government failed to object to the untimeliness of the amendment in the district court, but raised the issue on appeal after the trial court granted the motion. The court of appeals held that the district court lacked jurisdiction to rule on the merits of the untimely motion, but this Court unanimously reversed. Like the bankruptcy rules in *Kontrick*, the Court explained, the time limit for filing a motion for new trial is simply an "emphatic time prescription[]," 126 S. Ct. at 406, not a rule delineating the classes of cases the court may hear. As such, the time limit warranted neither the jurisdictional label nor its consequences. And because the Government failed to timely object to the lateness of the motion for a new trial in the district court, it could not raise that objection on appeal. *Id.* at 407.

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[4] Under the Bankruptcy Rules, the creditor was required to file the objection "no later than 60 days following the first date set for the meeting of creditors." Fed. R. Bankr. P. 4004(a).

3. In light of this Court's recent cases, it is impossible to escape the conclusion that the time limits of Rule 4(a) are nonjurisdictional. As in *Kontrick* and *Eberhart*, the time requirements in Rule 4(a) are not "prescriptions delineating the class of cases...falling within the court's adjudicatory authority," but rather a "claim-processing rule" the violation of which may be subject to forfeiture if not timely raised. *Eberhart*, 126 S. Ct. at 405.

That the time limits in Rule 4(a) govern the filing of a notice of appeal, rather than a bankruptcy complaint or a motion for new trial, is of no significance. As discussed above, the time limits for filing a notice of appeal have never been referred to as jurisdictional in the rules or statutes that established them, and the jurisdiction of the courts of appeals has always been expressly defined in separate provisions that mark the boundaries of that jurisdiction in relation to the finality of the district court's judgment, not the timing of the notice of appeal.

Indeed, this Court has already rejected the view that rules affecting the timeliness of a notice of appeal are jurisdictional. In *Eberhart*, the Court held that the time for filing a motion for a new trial in a criminal case is nonjurisdictional, even though the timely filing of such a motion will toll the time for filing a notice of appeal. *See* 126 S. Ct. at 407 (Fed. R. Crim. P. 33 not jurisdictional); Fed. R. App. P. 4(b)(3)(A)(ii) (Rule 33 motion tolls time for filing appeal). *Eberhart* also made clear that this Court's decision in *United States v. Robinson*, 361 U.S. 220 (1960) – which held that a district court lacked the authority to enlarge the time for filing a notice of appeal outside of the circumstances permitted in the rules – did not rest on a conclusion that the rules governing the timely filing of a notice of appeal affected a court's subject-matter jurisdiction. "*Robinson* is correct," the Court explained, "not because the District Court lacked *subject-matter jurisdiction*, but because district courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked." 126 S. Ct. at 406 (emphasis

in original). So, too, in this case, while the district court's authority to reopen the time for filing a notice of appeal is strictly limited by Rule 4(a)(6), that restriction is not jurisdictional.

Nor does it make a difference that the time limits at issue here are codified in a statute, as well as the Federal Rules of Appellate Procedure. While Congress plainly has the authority to make time limits a condition of subject-matter jurisdiction through legislation, there is no basis for believing that it intended to do so in passing 28 U.S.C. § 2107. As noted above, nothing in that statutory provision states that the limitation is jurisdictional and, in fact, Congress has expressly defined the jurisdiction of the courts of appeals in separate provisions, 28 U.S.C. §§ 1291-92, that make no reference to time limits for filing a notice of appeal. Given the longstanding Anglo-American legal tradition of defining jurisdiction in terms of subject matter and parties, rather than filing deadlines, there is every reason to believe that if Congress intended to make the limits in Section 2107 jurisdictional, it would have done so expressly.

B. At The Very Least, Limits Imposed On A District Court's Authority To Reopen The Time For Appeal Are Not Jurisdictional.

While it appears clear that none of the time limits in Rule 4(a) satisfy the criteria for subject-matter jurisdiction restrictions under this Court's recent cases, the Court ultimately need not so hold to resolve this case; even if a timely notice of appeal is a prerequisite for appellate jurisdiction, the district court's compliance with the fourteen-day restriction in Rule 4(a)(6) is not. So long as the appellant files a notice of appeal within the time designated in an order reopening the time for appeal, the court of appeals' jurisdiction is established even if the order exceeds the trial courts authority under the rules.

Although this Court has sometimes said that the "30-day time limit [of Fed. R. App. P. 4(a)(1)] is mandatory and jurisdictional," *Browder*, 434 U.S. at 264, it has never

suggested that every requirement in Rule 4(a) affects the subject-matter jurisdiction of the circuit courts. The fourteen-day limit in Rule 4(a)(6) is but one of several provisions of the Rule that cabin a trial court's authority to extend the time for appeal. Rule 4(a)(5), for example, permits a district court to extend the time for filing a notice of appeal, but only upon a showing of "excusable neglect or good cause." Fed. R. App. P. 4(a)(5)(A)(ii). And Rule 4(a)(6) itself permits reopening the time to file an appeal only if the court finds that no party would be prejudiced. But this Court has never suggested that any of these limitations are jurisdictional, such that a court of appeals would be obligated to review a district court's determination of good cause under Rule 4(a)(5) sua sponte, or that the parties may never stipulate to the absence of prejudice under Rule 4(a)(6).

Indeed, any such suggestion could not be squared with this Court's decision in *Thompson*, and its explication of *Robinson* in *Eberhart*. In *Thompson*, the Court held that a party's reliance on a district court's determination that good cause justified an extension precluded the court of appeals from second-guessing that determination on appeal. *See* 375 U.S. at 386-87. Likewise, in *Eberhart*, the Court made clear that while a district court must observe the limits on its authority to extend the time for taking an appeal or granting a new trial "when properly invoked," this did not mean that such limits "are not forfeitable when they are *not* properly invoked." 126 S. Ct. at 406 (emphasis in original).

There are sound reasons to conclude that restrictions on a court's authority to grant an extension should be considered nonjurisdictional, even if a party's compliance with the deadline for filing an appeal is not. A party wishing to disturb the lower court's judgment must make that intention known within a certain time by filing a notice of appeal, Fed. R. App. P. 4(a)(1)(A)-(B), a motion to extend the time for filing such a notice, Fed. R. App. P. 4(a)(5)(A)(i), or a motion to reopen the time to file an appeal, Fed. R. App. P. 4(a)(6)(B). The time limits for taking such actions provide

the prevailing party a measure of security in the finality of the district court's judgment in his favor if action is not taken by his opponent within the time prescribed. *See, e.g.*, *Browder*, 434 U.S. at 264. The fourteen-day limitation in Rule 4(a)(6), however, serves no such interest. Once a timely motion under Rule 4(a)(6) is filed, the prevailing party is on notice that he can no longer assume the finality of the judgment. And if the motion is granted, the prevailing party is immediately informed, on the face of the order, of the date after which finality will be restored if no notice of appeal is filed. On the rare occasion when the district court errs in setting that date, the prevailing party always has an opportunity to bring the error to the attention of the court and his opponent. But he can hardly complain that his legitimate interest in finality and repose has been impinged if he either does not notice the error in the order, or notices and decides not to inform the trial court of the mistake.

II. An Appeal Filed In Compliance With A Deadline Established By A Court Order Should Not Be Dismissed, Particularly Absent A Timely Objection To The Order In The District Court.

Because 28 U.S.C. § 2107 is not a statute that restricts subject-matter jurisdiction, the Sixth Circuit had jurisdiction to hear the appeal. But that does not necessarily mean that the court erred in dismissing the appeal as untimely. Even nonjurisdictional rules are binding on parties and courts and noncompliance may support dismissal of an action or an appeal in appropriate circumstances.

In determining whether dismissal was appropriate in this case, it should be understood at the outset that responsibility for the late filing of petitioner's appeal is shared by both parties as well as the district court. The court obviously is required to comply with the restrictions on its authority set forth in the Rules. *See Eberhart*, 126 S. Ct. at 406. And although the court's error was wholly uninvited – petitioner did not ask the court to extend the deadline by three days or propose a particular date – petitioner's counsel obviously

could have avoided the problem by checking the court's calculations and filing the notice of appeal two days earlier than he did. At the same time, the Government could have objected to the order in the district court, thereby allowing the trial court to correct the error before it had any potential of misleading petitioner into filing an untimely notice of appeal.

In such circumstances – when the appellant relies on a filing deadline established in a court order without objection from the appellee – dismissal is improper under this Court's established cases.

A. An Appeal Is Not Subject To Dismissal As Untimely When The Appellant Files A Notice Of Appeal In Reliance On A Deadline Established In A Court Order.

This Court has long held that an untimely appeal should not be dismissed when the appellant was misled by the district court into filing his notice of appeal outside the time provided in the rules.

In *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam), a district court granted an extension of time to file an appeal after counsel for the petitioner represented that he could not obtain authorization to file an appeal because his client's general counsel was on vacation in Mexico. The Seventh Circuit dismissed the appeal. The rule permitted an extension only if the party showed "excusable neglect *based on a failure of [the] party to learn of the entry of the judgment*."[5] However, Harris' counsel did not claim that he had not learned of the entry of the judgment, but rather that he was having difficulty communicating with his client. The court of appeals dismissed the appeal as untimely because under such circumstances, the district court lacked authority to grant the motion. This Court reversed in light of the "unique

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[5] *Id.* at 216 (emphasis added) (quoting Fed. R. Civ. P. 73(a) (1961)) (internal quotation marks omitted). Fed. R. Civ. P. 73(a) is the predecessor to Fed. R. App. P. 4(a).

circumstances" of the case. *Id.* at 217. Although the Court reaffirmed that an extension was available only upon showing excusable neglect in failing to learn of the entry of the judgment, and even though the Court did not question that the petitioner's need for an extension had nothing to do with lack of notice, this Court nonetheless held that dismissal of the appeal was unwarranted. *Id.* "In view of the obvious great hardship to a party who relies upon the trial judge's findings of 'excusable neglect' prior to the expiration of the 30-day period and then suffers reversal of the finding," the Court concluded, "the Court of Appeals ought not to have disturbed the motion judge's ruling." *Id.*

The Court applied this "unique circumstances" doctrine again in *Thompson v. INS*, 375 U.S. 384 (1964) (per curiam). The petitioner in that case had moved for a new trial in the district court. Had the motion been timely filed, it would tolled the time for filing a notice of appeal. *Id.* at 385-86. However, the motion was not timely. Nonetheless, the "the trial court specifically declared that the 'motion for a new trial' was made 'in ample time.'" *Id.* at 385. As a result, the petitioner waited until the trial court had disposed of the untimely motion before appealing. That delay rendered the appeal untimely. *Id.* at 385-86. Nevertheless, this Court held that the appeal should be heard as a result of the "unique circumstances": if the judge had not misinformed the party, the party "could have, and presumably would have, filed the appeal within 60 days of the entry of the original judgment...." *Id.* at 386.

This case falls squarely within the principle established by *Harris* and *Thompson*. Had the district court complied with the restriction on its authority to extend the time for appeal, there is no reasonable dispute that petitioner could have, and surely would have, filed a timely notice of appeal. To be sure, petitioner's counsel could have avoided a late filing by reviewing the rules and determining that the district court was mistaken. But the same was true in both *Harris* and *Thompson*. If anything, the circumstances of this case

support even greater solicitude for petitioner. In *Harris*, the error was invited by the appellant who requested an extension to which it was not entitled under the rules. In this case, the district court's error was of its own making, uninvited by petitioner's entirely proper motion. Moreover, in *Thompson*, the court simply stated that the petitioner's motion was timely after the petitioner had submitted an untimely motion entirely as a result of his own negligence. In this case, the district court issued an order affirmatively authorizing an appeal by a particular date.

2. The Sixth Circuit nonetheless held that the "unique circumstances" doctrine was inapplicable because, in its view, (a) this Court "severely limited" the unique circumstances doctrine in *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989); (b) this case is factually distinguishable from this Court's prior precedents; and (c) the 1991 Amendments to the Rules of Appellate Procedure "undermine[d] any argument for [a] liberal application" of the "unique circumstances" doctrine. *See* 432 F.3d at 675-76. None of the reasons is sound.

First, nothing in *Osterneck* "severely limited" or otherwise drew into question the continuing vitality of the "unique circumstances" doctrine. To the contrary, the Court in *Osterneck* simply held that the doctrine did not apply to the case before it because the court of appeals had properly found that "at no time has the district court or this court ever affirmatively represented to the Osternecks that their appeal was timely filed, nor did the Osternecks ever seek such assurance from either court." 489 U.S. at 178-79 (citation omitted) (internal quotation marks omitted). This Court has since reaffirmed that when a party *does* reasonably rely on a district court's order purporting to authorize an otherwise untimely appeal, the unique circumstances doctrine continues to apply. *See Carlisle v. United States*, 517 U.S. 416, 428 (1996) (confirming that *Thompson* "relied upon the 'unique circumstances' that the cause of the failure to meet the Rule's deadline was an...assurance by the District Court itself"); *id.*

at 435 (Ginsburg, J., concurring with two other members of the Court) (noting that the Court "has recognized one sharply honed exception" to seemingly inalterable time limits: "That exception covers cases in which the trial judge has misled a party who could have – and probably would have – taken timely action had the trial judge conveyed correct, rather than incorrect information.").

Second, the Sixth Circuit's attempts to distinguish this case from *Thompson* and *Harris* do not withstand scrutiny. The court of appeals held, on the authority of *Osterneck*, that *Thompson* applies only when the district court ratifies an erroneous action of a party, and that it has no application here, where the party relied on an uninvited error by the district court. Just why this Court would show more solicitude to a party who initiates an error, than one who is simply the victim of a court's mistake, the Sixth Circuit did not attempt to explain. But in any event, it is plain that nothing in *Osterneck* requires that nonsensical position. The relevant point was simply that some form of reliance on the district court was required, a reliance that was missing in *Osterneck* and is amply demonstrated in this case.[6]

Third, nothing in the 1991 Amendments to the Rules overruled any of this Court's prior cases construing or applying the "unique circumstances" doctrine. The addition of Rule 4(a)(6) was undoubtedly intended to regularize the process for reopening the time for filing appeals when a party had not been given notice of the judgment. It may be taken from that fact that the time limits in the rule were intended to be strictly enforced. But the same was undoubtedly true of the time limits in *Harris* (time for taking an appeal) and *Thompson* (time for motion for a new trial, having the effect of tolling the time for taking an appeal). This Court

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[6] The Sixth Circuit also noted that petitioner received no assurance from the district court that his appeal was timely. 432 F.3d at 675. But neither did the appellant in *Harris*, who, much like petitioner, was simply given an unauthorized extension of time in which to file his appeal. *See* 371 U.S. at 216.

nonetheless held that strictness of those rules did not require the dismissal of an appeal when the district court misled a party to miss the appeal deadline. By 1991, that precedent had been established and undisturbed for more than twenty-five years. And during that time, the Rules had been subject to repeated revisions without any indication that the Rules Committee or Congress intended to overrule that established precedent.

3. The "unique circumstances" doctrine appropriately accommodates the judicial system's sometimes competing interests in promoting enforcement of important procedural rules while also maintaining fair access to appellate review. As Justice Scalia has observed, "[t]he injustice caused by letting the litigant's own mistake lie is regrettable, but incomparably less than the injustice of *producing* prejudice through the court's intervention." *Castro v. United States*, 540 U.S. 375, 386-87 (2003) (Scalia, J., concurring in part and concurring in judgment). While litigants and their lawyers have a responsibility to ensure compliance with the rules, it is both expected and understandable that they will generally assume the correctness of orders issued by experienced federal judges. In recognition of this inevitable reliance, this Court has held in other contexts that reliance on incorrect advice from a trial court may be cause to excuse the misinformed forfeiture of important rights. *See, e.g.*, *Marvel v. United States*, 380 U.S. 262 (1965) (per curiam) (vacating a judgment and remanding for a hearing as to whether the petitioner was misled by the trial judge as to the length of the sentence prior to pleading guilty).

The unique circumstances doctrine is particularly appropriate in the habeas context, where important liberty interests are at stake and where procedural rules are often complex. Moreover, in the vast majority of cases, habeas petitioners proceed pro se in the district courts. *See* Roger A. Hanson & Henry W.K. Daley, U.S. Dep't of Justice, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS 17 (1995) (ninety-three percent of

habeas petitions are filed pro se). Pro se litigants necessarily rely heavily on the trial court's direction on what measures are necessary to comply with mandatory procedural requirements and to preserve a right to appellate review. Punishing pro se defendants for relying on that direction is incompatible with the long tradition of requiring courts to provide special assistance to pro se litigants in federal court. *See, e.g.*, *Castro*, 540 U.S. at 377 (majority opinion) (court must warn pro se litigant of consequences of recharacterizing motion for new trial as first habeas petition); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam) (liberal construction of pro se pleadings required).

B. The Government's Failure To Object To The Order Reopening The Time To File An Appeal Precludes Reliance On That Objection Now.

Even if the "unique circumstances" doctrine did not apply, dismissal would nonetheless be unwarranted because the Government could have, but did not, object in the district court to the unauthorized extension of the appeal period beyond the fourteen days permitted by the rule.

This Court has been clear that even claim-processing deadlines that are strict and "unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point." *Kontrick*, 540 U.S. at 456; *see also Eberhart*, 126 S. Ct. at 406 (emphasis omitted) (claim-processing rules are "forfeitable when they are not properly invoked").[7] Of course, ordinarily, the first occasion to object to an untimely notice of appeal is in the circuit court, at which point the objection would not provide any opportunity to avoid the timeliness problem (since the

---

[7] *See further, e.g.*, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (statutory time limit to file EEOC complaint is nonjurisdictional and thus subject to forfeiture); *cf. Arbaugh v. Y&H Corp.*, 126 S. Ct. 1235, 1245 (2006) (objection that claim does not satisfy nonjurisdictional statutory restriction is forfeited after trial on the merits).

time to appeal will already have passed). In such circumstances, it may be appropriate to allow dismissal of an untimely appeal even if not immediately objected to by the appellant, or to allow the defect to be noticed by the court sua sponte.

When, however, the error arises from the improper extension of the time to appeal by the trial judge, a party ordinarily will have an opportunity to object to an improper extension in the district court and should forfeit the right to object on appeal if it fails to inform the district court of the error in time for the mistake to be corrected. Most often, an objection can be made in response to the opponent's motion for an extension of time or to reopen the time for appeal. For example, the party may object that the applicant has not shown "excusable neglect or good cause" to support an extension under Rule 4(a)(5), or that the reopening of the time to appeal would cause prejudice under Rule 4(a)(6). The failure to make such an objection should preclude any argument in the circuit court that the appeal was untimely because the extension was wrongly granted. *Cf. Harris*, 371 U.S. at 216-17.

In the unusual circumstance where the error is uninvited – as in this case, where the Government could not have objected to the length of the extension when the motion was made because no particular time period was requested – an opposing party ordinarily will nonetheless have an opportunity to bring the error to the district court's attention through a subsequent objection or motion to reconsider. The failure to make such an objection until it is too late for the district court to correct its mistake and the appellant has acted in irreversible reliance on the order, should result in the forfeiture of the timeliness objection on appeal.

* * * * *

Under this Court's precedents, when a party files a notice of appeal within the time permitted by an erroneous order extending or reopening the time to file an appeal, and the opposing party fails to raise a timely objection to the error in

the district court, a court of appeals may not dismiss the subsequent appeal as untimely. The effect of this rule is to "admonish the Government that failure to object...entails forfeiture of the objection, and to admonish defendants that timeliness is of the essence, since the Government is unlikely to miss timeliness defects very often." *Eberhart*, 126 S. Ct. at 406-07.

In this case, because the Government made no objection to the district court's erroneous order, and because petitioner acted in reliance upon that order in filing his notice of appeal, the Sixth Circuit erred in dismissing the appeal. For that reason, the decision below should be reversed.

III. Even If Petitioner's Appeal Were Properly Dismissed For Lack Of Jurisdiction, The District Court Retains A Limited Authority To Issue Another Order Reopening The Time To File An Appeal.

Even if this Court determined that the district court's erroneous extension of time beyond the fourteen-day period authorized in the Rules created a jurisdictional defect that required dismissal of the appeal, the Court should nonetheless make clear that in limited circumstances, a district court retains the authority to reopen the appeal period a second time to permit a new and timely appeal.

As a general matter, dismissal of an appeal for lack of jurisdiction does not preclude a subsequent appeal when the conditions for jurisdiction have been satisfied. *See* 18A Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 4436 ("Dismissal of an appeal for want of appeal jurisdiction ... has no preclusion consequences when a later and proper appeal is taken."). For example, an unsuccessful attempt to appeal an interlocutory order does not preclude an appeal from final judgment.

In this case, the jurisdictional defect precluding review of petitioner's appeal could be remedied by the district court's once again reopening the time to file an appeal for fourteen days to permit petitioner to file a new and timely notice of

appeal. While the circumstances supporting such an order may be rare, there is nothing to preclude the district court from issuing a second Rule 4(a)(6) order when the criteria in the Rule have been met and the unique circumstances justify the action.

In particular, nothing in the text of Rule 4(a)(6) prevents a second reopening should the district court, in its discretion, consider it proper. Under the Rule, the court must find that (1) the moving party did not receive the required notice of the entry of the judgment within twenty-one days after entry; (2) the party filed a motion to reopen within 180 days of entry of the judgment or seven days of receiving proper notice; and (3) no party would be prejudiced by the reopening. *See* Fed. R. App. P. 4(a)(6)(A)-(C). Here, it is undisputed that petitioner did not received the required notice of judgment and that he filed a motion to reopen within 180 days of the judgment and seven days after learning of its entry. *See* 432 F.3d at 670.[8] The district court would, of course, be required to determine whether reopening the judgment for a second time at this late date would prejudice the Government.[9] And even if the court found that the prerequisites for reopening were met, it would still be allowed, in its discretion, to deny the motion. *See* Fed. R. App. P. 4(a)(6) ("The district court *may* reopen the time to file an appeal....") (emphasis added). But once the three prerequisites for reopening are satisfied, nothing in the Rule precludes a second reopening simply because a prior order

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[8] Because the district court may reopen the appeal period in response to the original motion, there would be no need for a second motion (which would be untimely under the rule if filed more than 180 days after the entry of judgment).

[9] A second reopening would not be prejudicial within the meaning of the rule simply because it allowed petitioner to take an appeal that the Government could otherwise avoid. Advisory Committee Notes, Fed. R. App. P. 4 ("[b]y 'prejudice' the Committee means some adverse consequence other than the cost of having to oppose the appeal and encounter the risk of reversal").

was previously issued, and an appeal unsuccessfully attempted.

While this suggestion may seem novel, a similar practice has been established under 28 U.S.C. § 1292. That provision authorizes a district court to issue an order permitting a party to take an interlocutory appeal from a qualifying order. The statute "permit[s] an appeal to be taken from such order...if application is made to [the court of appeals] within ten days after the entry of the order." *Id.*; *see also* Fed. R. App. P. 5(a) (same). Over the years circuit courts have regularly confronted the situation in which a district court has issued an order certifying an interlocutory appeal under Section 1292(b), but the party failed to perfect the appeal by making the required application to the circuit court within ten days as required by statute. In such circumstances, the courts regularly permit the district court to recertify the order permitting interlocutory appeal in response to the original motion. *See, e.g.*, *Marisol v. Giuliani*, 104 F.3d 524, 528 (2d Cir. 1996) (allowing recertification of order if it would enhance efficiency); *In re Benny*, 812 F.2d 1133, 1137 (9th Cir. 1987) (same); *Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 247 (7th Cir. 1981) (same); *Aparicio v. Swan Lake*, 643 F.2d 1109, 1112-13 (5th Cir. 1981) (allowing recertification freely).[10]

Permitting a second reopening of the time to appeal accords with the purpose behind the Rule to provide an

---

[10] This Court implicitly approved the recertification practice in *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), when it reviewed a case on recertified interlocutory appeal. Justice Stevens, dissenting on the merits, noted the Court was required to examine, *sua sponte*, the propriety of the recertification process, as the time limits for perfecting a certified appeal are expressly made conditions of the circuit court's subject-matter jurisdiction over interlocutory orders. *Id.* at 160-61 (citing 28 U.S.C. § 1292(b)). Although the majority did not discuss the question, the dissent "concur[red] in the majority's holding that there is jurisdiction." *Id.* at 162.

avenue for appeal when a petitioner has good excuse for missing a prior opportunity. "Rule 4(a)(6) was adopted to soften the harsh penalty of losing one's right to appeal due to the government's malfeasance in failing to notify a party of a judgment...." *Arai v. American Bryce Ranches Inc.*, 316 F.3d 1066, 1070 (9th Cir. 2003). There is no reason why the rule should not also be available to prevent a party from losing his right to appeal due to the district court's error in ordering the reopening of an appeal.

To be sure, a second reopening under the Rule would only be possible in rare and limited circumstances. As previously noted, the district court would be prohibited by the terms of Rule 4(a)(6) from granting a second reopening if there would be prejudice to any party. Moreover, the court's exercise of discretion to allow a second reopening would be subject to appellate review and, with good reason, subject to careful scrutiny. It is safe to say that the court's discretion would be abused if the failure to perfect an appeal upon the first reopening was solely due to the neglect of the party. *Cf. Braden v. University of Pittsburgh*, 552 F.2d 948, 955 (3d Cir. 1977) (allowing recertification of interlocutory appeal orders only in cases where parties did not have notice of order due to the district court's dereliction). But under the circumstances present in this case – where the initial deadline is missed in reliance upon an erroneous order to which the opposing party failed to make a timely objection – permitting a second reopening would be entirely appropriate.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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January 22, 2007

FILED
DEC 12 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-5306

IN THE

Supreme Court of the United States

KEITH BOWLES,

Petitioner,

v.

HARRY RUSSELL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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CERTIORARI GRANTED DECEMBER 7, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed 3/3/04]

Case No. 04-3262

KEITH BOWLES,
Petitioner-Appellant,

v.

HARRY RUSSELL, Warden,
Respondent-Appellee.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
3/3/04		Prisoner Case Docketed with certificate of appealability denied. Notice filed by Appellant Keith Bowles. Transcript needed: n ❑ (jc)
3/3/04		Electronic case filing. District court record can be downloaded electronically. [04-3262] (jc)
3/4/04		Case referred to Staff Attorney Office. ❑ [04-3262] (mmm)
3/10/04		SHOW CAUSE order filed to have Keith Bowles show cause for possible jurisdictional defect involving the filing of a late notice of appeal. Response due by 3/31/04 for Paul Mancino [04-3262]. (jc)
3/15/04		APPEARANCE filed by Attorney Paul Mancino for Appellant Keith Bowles [04-3262] (jc)
3/29/04		RESPONSE by Paul Mancino for Appellant Keith Bowles regarding the showcause for jurisdiction: late notice of appeal [2916471-1] [04-3262] . (jc)

DATE	NO.	PROCEEDINGS
4/26/04		ORDER filed discharging showcause order the showcause for jurisdiction: late notice of appeal. It is ordered that the appeal is dismissed for lack of jurisdiction as it applies to the July 28, 2003 judgment and the September 9, 2003 order. The appeal was timely filed as it applies to the February 10, 2004 ruling. [2916471-1] [04-3262]. James L. Ryan, Circuit Judge, Martha C. Daughtrey, Circuit Judge, Eric L. Clay, Circuit Judge. (jc)
8/30/04		MOTION CAUSE SUBMITTED to panel. [04-3262] (bb)
9/8/04		ORDER filed denying a certificate of appealability. [04-3262] . Entered by order of the court. (jc)
9/8/04		LETTER SENT TO district court by jc sending a certified copy of order filed 9/8/04. [04-3262] (jc)
9/20/04		PETITION for rehearing before original panel filed by Paul Mancino for Appellant Keith Bowles. Certificate of service date 9/16/04. [04-3262] (jc)
11/22/04		MOTION CAUSE SUBMITTED to panel. [04-3262] (alr)
12/28/04		ORDER filed to reinstate appeal. [04-3262], to grant in part and deny in part a certificate of appealability. The clerk's office is directed to estaalish a briefing schedule regarding certain issues. [04-3262]. Boyce F. Martin, Circuit Judge, Karen N. Moore, Circuit Judge, Robert H. Bell, Chief District Judge for the Western District of Michigan, sitting by designation. (jc)

DATE	NO.	PROCEEDINGS
12/28/04		LETTER SENT TO district court by jc sending a certified copy of order filed 12/28/04. [04-3262] (jc)
12/28/04		BRIEFING LETTER SENT setting briefing schedule: appellant brief due 2/7/05; appellee brief due 3/11/05; appendix due 4/4/05; final appellant brief due 4/25/05. [04-3262] final appellee brief due 4/25/05;. (jc)
2/7/05		PROOF BRIEF filed by Paul Mancino for Appellant Keith Bowles. Certificate of service date 2/4/05 Number of Pages: 19. [04-3262] ❑ (vf)
2/7/05		Request to require oral argument filed by Paul Mancino for Appellant Keith Bowles [04-3262] (vf)
3/14/05		APPEARANCE filed by Attorney Bruce D. Horrigan for Appellee Harry Russell [04-3262] (laj)
3/14/05		PROOF BRIEF filed by Bruce D. Horrigan for Appellee Harry Russell. Certificate of service date 3/10/05. Number of Pages: 20. [04-3262] ❑ (vf)
3/14/05		Request to waive oral argument and submit case on the briefs, (waiver on page: 1), filed by Bruce D. Horrigan for Appellee Harry Russell [04-3262] (vf)
4/4/05		APPENDIX filed by Paul Mancino for Appellants. Copies: 5 (Vol 1-3). Certificate of service date 4/1/05. [04-3262] (vf)

DATE	NO.	PROCEEDINGS
4/25/05		FINAL BRIEF filed by Bruce D. Horrigan for Appellee Harry Russell. Copies: 7. Certificate of service date 4/22/05. Number of Pages: 19. [04-3262] (vf)
4/25/05		Request to waive oral argument and submit case on the briefs, (waiver on page: 1), filed by Bruce D. Horrigan for Appellee Harry Russell [04-3262] (vf)
4/25/05		FINAL BRIEF filed by Paul Mancino for Appellant Keith Bowles. Copies: 7. Certificate of service date 4/22/05 Number of Pages: 19. [04-3262] (vf)
4/25/05		Request to require oral argument filed by Paul Mancino for Appellant Keith Bowles [04-3262] (vf)
8/15/05		Oral argument date set for October 25, 2005 in court room 636. Notice of argument sent to counsel on 8/22/05. Notice of argument sent to counsel. [04-3262] (pjm)
8/15/05		CAUSE SUBMITTED on briefs to panel consisting of Judges Boggs, Gibbons, Rose sitting on 10.25.05. [04-3262] (kal)
9/6/05		Appellant MOTION filed to postpone oral argument, or in the alternative to sibmit on briefs. Motion filed by Paul Mancino for Appellant Keith Bowles. Certificate of service date 9/2/05 [04-3262] (jc)

DATE	PROCEEDINGS
9/6/05	Appellee RESPONSE non opposition filed regarding a motion to postpone oral argument [3227760-1]; previously filed by Paul Mancino Jr.. Response from Bruce D. Horrigan for Appellee Harry Russell. Certificate of service date 9/2/05 [04-3262] (jc)
9/9/05	ORDER filed denying motion to postpone oral argument. The appellant may submit on briefs. [04-3262]. Entered by order of the court. (jc)
12/28/05	OPINION filed: DISMISSED for lack of jurisdiction [04-3262], decision for publication pursuant to local rule 206 [04-3262]. Danny J. Boggs, Authoring Chief Judge, Julia S. Gibbons, Circuit Judge, Thomas M. Rose, District Judge for the Southern District of Ohio. (jc)
12/28/05	JUDGMENT: DISMISSED. (jc)
1/11/06	Appellant MOTION filed to extend time to file petition for rehearing until 1/25/06. Motion filed by Paul Mancino for Appellant Keith Bowles. Certificate of service date 1/9/06 [04-3262] (jc)
1/12/06	LETTER SENT by jc granting motion to extend time to file petition for rehearing [3301419-1] filed by Paul Mancino Jr. Petition to be filed by 1/25/06 for Paul Mancino [04-3262] (jc)
1/23/06	ADDITIONAL PETITION for en banc rehearing filed by Paul Mancino for Appellant Keith Bowles. Certificate of service date 1/20/06. [04-3262] (blh)

DATE	NO.	PROCEEDINGS
4/21/06		ORDER filed denying petition for en banc rehearing [3307811-1] filed by Paul Mancino Jr. [04-3262]. Danny J. Boggs, Julia S. Gibbons, Circuit Judges; Thomas M. Rose, District Judge. (blh)
5/5/06		MANDATE ISSUED with no cost taxed [04-3262] (jc)
7/25/06		U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Keith Bowles. Filed in the Supreme Court on 07-14-06, Supreme Ct. case number: 06-5306. [04-3262] (swh)
12/11/06		U.S. Supreme Court letter filed granting petition for writ of certiorari [3416329-1] filed by Keith Bowles Supreme court No. 06-5306. Filed in the Supreme Court on 12-07-06. (swh)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
(Cleveland)

[Filed 8/5/2002]

Case No. 1:02-cv-01520-DCN

KEITH BOWLES,

Petitioner,

v.

HARRY RUSSELL,

Respondent.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
08/05/2002	1	Petition under 28 USC 2254 for Writ of Habeas Corpus by a person in state custody. Filed by Keith Bowles. Filing fee not paid (C, B) Additional attachment (civil cover sheet) added on 8/6/2002 (C, B). (Entered: 08/06/2002)
08/05/2002	2	Random Assignment of Magistrate Judge Streepy. (C, B) (Entered: 08/06/2002)
08/05/2002	3	Administrative Track DCM Initial Order. Chief Judge Paul R. Matia (C, B) (Entered: 08/06/2002)
09/03/2002	4	Order to Show Cause within 23 days of the receipt of this order the Attorney General shall make a return certifying the true cause of the detention in accordance with 28 U.S.C. Section 2243. Attach to the return

DATE	NO.	PROCEEDINGS
		certified copies of (a) the indictment, (b) the petitioner's plea, (c) the judgment of the state trial court, (d) the opinion of the Court of Appeals, (e) the decision of the Supreme Court in accorcance with 28 U.S.C. Section 2249. Petitioner shall have thirty (30) days from the filing of respondent's answer to respond thereto. Judge Donald C. Nugent (R, J M) (Entered: 09/05/2002)
09/03/2002	5	Order that this case does not neccesitate a Case Management Conference and is assigned to the Administrative Track. Judge Donald C. Nugent (R, J M) (Entered: 09/05/2002)
09/03/2002	6	Automatic Reference of Administrative Action to Judge Jack B. Streepy. Judge Donald C. Nugent (R, J M) (Entered: 09/05/2002)
09/23/2002	7	Motion for extension of time until October 28, 2002 to file answer filed by Harry Russell. (Horrigan, Bruce) (Entered: 09/23/2002)
09/25/2002	8	Order that petitioner shall either submit the filing fee- $5 - or fill out and submit an application to proceed in forma pauperis within 30 days of this order.Magistrate Judge Jack B. Streepy (S, D J) (Entered: 09/25/2002)
10/12/2002		Order (non-document) on 10/12/2002 Granting Motion for extension of time (Related Doc # 7) Magistrate Judge Jack B. Streepy (S, D J) (Entered: 10/12/2002)

DATE	NO.	PROCEEDINGS
10/24/2002	9	Return of Writ (2254) filed by Harry Russell. (Horrigan, Bruce) (Entered: 10/24/2002)
10/24/2002	10	Notice of Manual Filing filed by Harry Russell. (Related document(s)9) (Horrigan, Bruce) (Entered: 10/24/2002)
10/24/2002	11	Excerpt Transcript of proceedings in Lake County Common Pleas Court case, #98CR429. Complete document on file in the Clerk's Office (181 pages). (C, B) (Entered: 10/25/2002)
10/24/2002	12	Appendix to return of writ filed by Harry Russell. (Related document(s) 10, 9) (C, B) (Entered: 10/25/2002)
10/24/2002	13	Transcript of proceedings in Lake County Common Pleas Court, case #98CR429, Volume I (208 pages). Complete document on file in the Clerk's Office. (Related documents(s) 10) (C, B) (Entered: 10/25/2002)
10/24/2002	14	Transcript of proceedings in Lake County Common Pleas Court, case #98CR429, Volume II (315 pages). Complete document on file in the Clerk's Office. (Related documents(s) 10) (C, B) (Entered: 10/25/2002)
10/24/2002	15	Transcript of proceedings in Lake County Common Pleas Court, case #98CR429, Volume III (59 pages). Complete document on file in the Clerk's Office. (Related documents(s) 10) (C, B) (Entered: 10/25/2002)
12/02/2002	16	Traverse to Return of Writ and brief filed by Keith Bowles. (Related document(s)9) (C, B) (Entered: 12/02/2002)

DATE	NO.	PROCEEDINGS
05/23/2003	17	Report and Recommendation that the petition be denied. Magistrate Judge Jack B. Streepy (S, DJ) (Entered: 05/23/2003)
05/23/2003	18	Order terminating case referral and returning file to Judge Nugent. Magistrate Judge Jack B. Streepy (issued by U.S. Mail to counsel for Petitioner) (S, DJ) (Entered: 05/23/2003)
06/03/2003	19	Motion for extension of time until 7/1/03 to file objections to the report and recommended decision filed by Keith Bowles. (Related document(s) 17) (C, B) (Entered: 06/03/2003)
06/27/2003	20	Objections and exceptions to Report and Recommendation filed by Keith Bowles. (Related document(s)17) (C, B) Modified text on 6/27/2003 (C, B). (Entered: 06/27/2003)
07/10/2003	21	Response to Petitioner's Objections to Magistrate Judge's Report and Recommendation filed by Harry Russell. (Related document(s)20) (Horrigan, Bruce) (Entered: 07/10/2003)
07/10/2003	22	Memorandum, Opinion Adopting the Magistrate Judge's Report and Recommended Decision and Denying the petition for a writ of habeas corupus; the court further certifies, pursuant to 28:1915(a)(3), that an appeal from this decision could not be taken in good faith, and there is no basis upon which to issue a certificate of appealability. Donald C. Nugent, Judge (Related documents 17) (C, B) (Entered: 07/28/2003)

DATE	NO.	PROCEEDINGS
07/10/2003	23	Judgment, in accordance with the Memorandum Opinion, Denying Petitioner's motion filed pursuant to 28:2254; and certifying, pursuant to 28:1915(a)(3), that an appeal from this deacision could not be taken in good faith and there is no basis upon which to issue a certificate of appealability. Donald C. Nugent, Judge (Related documents 22) (C, B) (Entered: 07/28/2003)
08/06/2003	24	Motion for new trial or to alter and amend judgment filed by Keith Bowles. (Attachments: # 1 Exhibits) (Related document(s) 22, 23) (C, B) (Entered: 08/06/2003)
09/09/2003	25	Order denying Motion for new trial (Related Doc # 24), denying Motion to alter/amend judgment (Related Doc # 24) Judge Donald C. Nugent(R, J M) (Entered: 09/09/2003)
12/12/2003	26	Motion to vacate order denying new trial and to reopen time to appeal filed by Keith Bowles. Related document(s)25. (Attachments: # 1. Affidavit of counsel)(C, B) (Entered: 12/12/2003)
02/10/2004	27	Marginal Order that as to re-opening of appeal pursuant to Rule 4(a)(6), motion granted in part and appeal to be filed by 2/27/2004; motion denied in part as to Motion to vacate (Related Doc # 26). Signed by Judge Donald C. Nugent on 2/10/2004.(E, S) (Entered: 02/10/2004)

DATE	NO.	PROCEEDINGS
02/26/2004	28	NOTICE OF APPEAL to the 6th Circuit Court of Appeals from the 22 Memorandum of Opinion and 23 Judgment Entry of 7/10/03 and from the 25 Order of 9/9/03, filed by Keith Bowles (Attachments: #(1) Marginal order of 2/10/04). (H, S P) Modified text 3/8/2004 (C, K A). (Entered: 02/27/2004)
03/08/2004	29	Acknowledgment from the USCA for Sixth Circuit of receipt of notice of appeal 28 (USCA #04-3262). (C, K A) (Entered: 03/08/2004)
03/08/2004	30	USCA Appeal Fees received $ 255.00 receipt number 659108 re 28 Notice of Appeal (C, K A) (Entered: 03/08/2004)
09/10/2004	31	True copy of order from the USCA for the Sixth Circuit denying application for certificate of appealability (USCA #04-3262). Date issued 9/8/04. (related doc 28) (C, K A) (Entered: 09/13/2004)
01/03/2005	32	Order of USCA for the Sixth Circuit: Granting in part and denying in part a certificate of appealability as to 28 Notice of Appeal (USCA# 043262). USCA Clerk's office is to establish a briefing schedule. Circuit Judges: Martin and Moore, District Judge: Bell (Related document 31) (H, S P) (Entered: 01/04/2005)
12/30/2005	33	Information Copy of opinion from USCA for the Sixth Circuit: Dismissing the 28 Notice of Appeal, for lack of jurisdiction (USCA# 043262). This is not a mandate

DATE	NO.	PROCEEDINGS
		order. Circuit Judges: Boggs and Gibbons, District Judge: Rose. Date issued by USCA 12/28/05 (Attachments: # 1 Judgment) (H, S P) (Entered: 12/30/2005)
05/08/2006	34	True copy of mandate from the USCA for the Sixth Circuit: Dismissing the 28 Notice of Appeal, for lack of jurisdiction (USCA# 04-3262). Date issued by USCA 5/5/06 (Related document 33) (H, S P) (Entered: 05/09/2006)
08/02/2006	35	Appeal Remark from US Supreme Court: The petition for a writ of certiorari was filed 7/14/06 and placed on the docket 7/18/06 as No. 065306 (H, S P) (Entered: 08/03/2006)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Name: Keith Bowles

Prisoner No.: 368 795

Case No.: 1:02CV 1520

Place of Confinement: Lebanon Correctional Institution
P.O. Box 56
Lebanon, Ohio 45036

Name of Petitioner: Keith Bowles v.

Name of Respondent: Harry Russell

The Attorney General of the State of: Ohio

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Court of Common Pleas of Lake County; Case 98CR000429
2. Date of judgment of conviction: March 6, 1999
3. Length of sentence: Fifteen Years To Life
4. Nature of offense involved (all counts): Murder
   Ohio Revised Code Sec. 2903.02
5. What was your plea? (Check one)

   (a) Not guilty X
   (b) Guilty ☐
   (c) Nolo contendere ☐

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

   _____

   _____

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury X
   (b) Judge only ☐

7. Did you testify at the trial?
   Yes X No ☐

8. Did you appeal from the judgment of conviction?
   Yes X No ☐

9. If you did appeal, answer the following:

   (a) Name of court: Court of Appeals for Lake County

   (b) Result: Judgment Affirmed

   (c) Date of result and citation, if known: May 15, 2001; Case No. 99–L-075

   (d) Grounds raised: All grounds raised in this petition were raised in the appeal to the Court of Appeals for Lake County

   (e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

      (1) Name of court: Ohio Supreme Court

      (2) Result: Motion for Leave to Appeal Denied

      (3) Date of result and citation, if known: September 15, 2001; Case No. 01-1108

      (4) Grounds raised: All grounds raised in this petition were raised in the appeal to the Ohio Supreme Court

   (f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

      (1) Name of court _____

      (2) Result _____

(3) Date of result and citation, if known _____

(4) Grounds raised _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes ☐ No X

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ❑ No ❑

(5) Result _____

(6) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ❑ No ❑

(5) Result _____

(6) Date of result _____

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ❑ No ❑
(2) Second petition, etc. Yes ❑ No ❑

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

_____

_____

_____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: SIXTH AMENDMENT

Supporting FACTS (*state briefly* without citing cases or law): Petitioner was denied a fair and impartial jury. No black jurors were summoned to appear as jurors at petitioner's trial who was a blck or African-American. Moreover prospective jurors who were called for the

trial had recent exposure to the trial of a co-defendant and had information from that trial thus could not be fair and impartial.

B. Ground two: FOURTEENTH AMENDMENT

Supporting FACTS (state *briefly* without citing cases or law): Petitioner was denied due process of law when the court called a co-defendant, Richard T. Hayden as a court's witness. This enhanced the credibility of Richard T. Hayden and prevented petitioner from having a fair trial.

C. Ground three: FIFTH, SIXTH AND FOURTEENTH AMENDMENTS

Supporting FACTS (state briefly without citing cases or law): Petitioner was denied due process of law and a fair trial when the court permitted questioning of petitioner when he testified as a witness and later commented on the fact that petitioner did not come forward and voluntarily make a statement to the police. Petitioner's right to a fair trial was further compromised when the court permitted evidence to be offered concerning alleged efforts made by the police to contact petitioner for a statement.

D. Ground four: FOURTEENTH AMENDMENT

Supporting FACTS (state briefly without citing cases or law): Petitioner was denied a fair trial when the prosecutor was permitted to elicite from a co-defendant that he had been convicted and did not give any limiting instruction to the fact that the co-defendant had been convicted.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:

_____

_____

_____

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ❑ No X ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: None

(b) At arraignment and plea: Public Defender

GROUND FIVE: FOURTEENTH AMENDMENT

SUPPORTING FACTS: Petitioner was denied due process of law when the court refused to instruct on any lesser included offense including the offense of assault. Petitioner's version of the events required that that be submitted to the jury.

GROUND SIX: FOURTEENTH AMENDMENT

SUPPORTING FACTS: Petitioner was denied due process of law when the court improperly informed the jury concerning a presumption given to the state in proving aiding and abetting.

GROUND SEVEN: FOURTEENTH AMENDMENT

SUPPORTING FACTS: Petitioner was denied due process of law and a fair trial when the court instructed the jury that an "accomplice" had testified for the prosecution thus implying that petitioner was an accomplice of the witness.

GROUND EIGHT: FOURTEENTH AMENDMENT

SUPPORTING FACTS: Petitioner was denied due process of law and a fair trial when the court would not instruct that the state had to prove a culpable mental state to convict petitioner. The court also so improperly instructed the jury concerning flight when that was not an issue and deprived petitioner of a fair trial.

GROUND NINE: FOURTEENTH AMENDMENT

SUPPORTING FACTS: Petitioner was denied a fair trial when the prosecutor was permitted to make improper arguments to the jury which inflamed the jury, misrepresented the evidence and also urged the jury to convict because petitioner did not come in to make a statement to the police.

GROUND TEN: FOURTEENTH AMENDMENT

SUPPORTING FACTS: Petitioner was denied due process of law and equal protection of the law when was convicted of murder, which under the Ohio statutory scheme, if the equivalent of involuntary manslaughter. Murder carries a penalty of fifteen (15) years to life. Involuntary manslaughter carries a maximum sentence often (10) years. Yet for the same elements petitioner was sentenced to fifteen (15) years to life thus violating his right of due process of law and equal protection of the law.

GROUND ELEVEN: FOURTEENTH AMENDMENT

SUPPORTING FACTS: Petitioner was denied due process of a law when there was insufficient evidence presented to convict petitioner as an aider and abettor.

(c) At trial: Paul Mancino, Jr.

(d) At sentencing: Same

(e) On appeal: Same

(f) In any post-conviction proceeding _____

(g) On appeal from any adverse ruling in a post-conviction proceeding _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ❑ No ☒

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes ❑ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) Give date and length of the above sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ❑ No ❑

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

/s/ Paul Mancino, Jr.
PAUL MANCINO, JR.
75 Public Square, Ste. 1016
Cleveland, Ohio 44113
(216) 621-1742

I declare under penalty of perjury that the foregoing is true and correct. Executed on _____.
(date)

/s/ Keith Bowles
KEITH BOWLES
Signature of Petitioner

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:02 CV 1520

Judge Donald C. Nugent

Magistrate Judge Streepy

KEITH BOWLES,

Petitioner,

v.

HARRY RUSSELL, Warden,

Respondent.

RESPONDENT HARRY RUSSELL'S ANSWER AND RETURN OF WRIT

Respondent respectfully answers the petition for writ of habeas corpus filed in the United States District Court, Northern District of Ohio, Eastern Division. The petition was filed pursuant to 28 U.S.C. § 2254 by Keith Bowles, inmate #368-795, a person in state custody.

Respondent, Harry Russell is Warden of the Lebanon Correctional Institution, Lebanon, Ohio. As Warden, Respondent maintains custody of Petitioner, pursuant to a journal entry of sentence issued by the Court of Common Pleas for Lake County, Ohio, upon conviction for murder, in violation of O.R.C. § 2903.02. (Exhibit 7, Lake County Court of Common Pleas Case No. 98 CR 429). Respondent denies each and every ground for relief contained in the petition for writ of habeas corpus except for those grounds expressly admitted in the instant return and attachments hereto.

Respectfully submitted,

BETTY D. MONTGOMERY
Ohio Attorney General

s/BRUCE D. HORRIGAN
Bruce D. Horrigan (0047170)
Assistant Attorney General
Corrections Litigation Section
State Office Bldg., 11th Floor
615 West Superior Avenue
Cleveland, Ohio 44113-1899
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(216) 787-3030
(216) 787-3480 Fax

Attorney for Respondent
Harry Russell, Warden

MEMORANDUM

I. STATEMENT OF FACTS

Respondent's statement of facts pertaining to Petitioner's case is adopted from the Opinion filed in the Court of Appeals for the Eleventh Appellate District, Case Number 99-L-075, Exhibit 15 at pages 2-3 and are essentially as follows:

On the evening of August 22, 1998, appellant and three of his friends, Richard Hayden, a.k.a. "Snoop", Damon Anderson, a.k.a "Long", and Jamal Russell, a.k.a. "Dred", drove from Cleveland to see a rap music group perform at Hellbusters, a bar in Fairport Harbor, Ohio. Appellant and his friends left the bar at 2:30 a.m., and drove to Painesville to attend an after-hours party at the Argonne Arms Apartment complex. On their way to the party, they drove past a bar named Nino's located on Prospect Street in Painesville. Outside Nino's, Hayden saw his cousin, Marcus Moore, a.k.a. "Choc", who appeared to be injured, yelling at police officers. When appellant and his friends drove past the bar again to look for Moore, he was gone. The group proceeded to drive up Prospect Street, where they saw Moore and some of their other friends from Cleveland. Appellant, Hayden, Long, and Russell learned that Moore and the others had been jumped and beaten up by a group of guys from Painesville, Antonio Rymmer, a.k.a "Stickman", and his friends.

Appellant, Hayden, Long and Russell then decided to drive to the Argonne Arms Apartment complex to find Rymmer and beat him up in revenge for jumping their friends. When they arrived at the apartment complex, they found Rymmer, but because he was holding a gun, they drove past him. As they were driving through the complex, they also saw another man, later identified as Kenneth Johnson, a.k.a. "Dirty", holding a rifle and taking to Long's brother, Delmarcus, a.ka. "Peanut." They next encountered Ollie Gipson, a.k.a. "Nato" or "Trenne", whom they did not know. At that point, appel-

lant, Hayden, and Long got out of the car and started to beat Gipson by punching, kicking and stomping on him. Gipson died as a result of the injuries he sustained in the attack.

II. PROCEDURAL POSTURE

On September 4, 1998, the Grand Jury for Lake County, Ohio returned a single count indictment, charging Petitioner with murder in violation of O.R.C. § 2903.02. (Exhibit 2, Lake County Court of Common Pleas Case No. 98 CR 429).

On January 5, 1999, Petitioner, through counsel, filed a motion to dismiss. (Exhibit 3). On January 25, 1999, the State of Ohio filed a brief in opposition to Petitioner's motion to dismiss. (Exhibit 4). On February 12, 1999, the trial court denied Petitioner's motion to dismiss. (Exhibit 5).

A jury trial commenced on March 1, 1999. (See Exhibit 1, Docket). On March 3, 1999, the jury returned a guilty verdict, as charged in the indictment. (Exhibit 6 & 7). On that same date, Petitioner was sentenced to an indefinite term of fifteen (15) years to life in prison for the offense of murder. (Exhibit 7, Case No. 98 CR 429).

On March 9, 1999, Petitioner, through counsel, filed a motion for judgment of acquittal or, in the alternative motion for new trial. (Exhibit 8). On March 24, 1999, the State filed an opposition to the Petitioner's motion. (Exhibit 9). On April 13, 1999, the trial court denied Petitioner's motion for judgment of acquittal and motion for new trial. (Exhibit 10).

A. Petitioner's Direct Appeal

On May 10, 1999, Petitioner, through counsel, filed a notice of appeal to the Ohio Court of Appeals for the Eleventh Appellate District from the judgment of conviction and sentence entered on March 9, 1999 and from the order of the Common Pleas Court overruling defendant's motion for judgment of acquittal, or in the alternative a motion for a new trial, which was entered April 14, 1999. (Exhibit 12, assigned

Case No. 99 L 075). On December 13, 1999, Petitioner, through counsel, filed an appellate brief raising thirteen (13) assignments of error, to wit:

I. Defendant was denied a fair and impartial trial jury venire.

II. Defendant was denied due process of law when the Court called Richard T. Hayden as a Court's witness.

III. Defendant was denied due process of law and a fair trial when the Court permitted questioning of defendant and commented on the fact defendant did not make a statement to the police.

IV. Defendant was denied a fair trial when the Court permitted evidence to be offered concerning efforts made to contact the defendant.

V. Defendant was denied a fair trial when the prosecutor elicited from Richard T. Hayden that he had been convicted of murder.[1]

VI. Defendant was denied due process of law when the Court refused to instruct on the lesser-included offense of assault.

VII. Defendant was denied due process of law when the Court improperly informed the jury concerning a presumption of aiding and abetting.

VIII. Defendant was denied due process of law and a fair trial when the Court instructed the jury that an "accomplice" had testified.

IX. Defendant was denied due process of law when the Court would not instruct on a culpable mental state.

---

[1] The fifth assignment of error argued that the trial court erred by failing to give a limiting instruction to the jury regarding the co-defendant's conviction.

X. Defendant was denied due process of law when the Court instructed on flight.

XI. Defendant was denied a fair trial by reason of improper prosecutorial argument.

XII. Defendant was denied due process of law when the Court overruled defendant's motion to dismiss.

XIII. Defendant was denied due process of law when the Court overruled defendant's motion for judgment of acquittal.

(Exhibit 13). On March 10, 2000, the State filed a brief opposing the assignments of error raised by Petitioner. (Exhibit 14). On May 14, 2001, the state appellate court issued its Opinion affirming the trial court's judgment of conviction and sentence and denial of Petitioner's motion for judgment of acquittal or new trial. (Exhibit 15, Case No. 99 L 075).

On May 22, 2001, Petitioner, through counsel, filed an application for reconsideration. (Exhibit 16). On July 11, 2001, the appellate court denied Petitioner's motion. (Exhibit 17).

On June 18, 2001, Petitioner, through counsel, filed a notice of appeal from the decision rendered by the Eleventh District Court of Appeals on May 14, 2001, as well as a memorandum in support of jurisdiction in the Ohio Supreme Court. (Exhibits 18 & 19, Case No. 01-1108). Petitioner asserted thirteen (13) propositions of law, to wit:

Proposition of Law One: A defendant was denied a fair trial jury venire, which contains no African-American juror and has been exposed to pretrial publicity.

Proposition of Law Two: A defendant is denied due process of law when a court calls a co-defendant as a Court's witness.

Proposition of Law Three: A defendant is denied due process of law and a fair trial when a Court permits

questioning of a Defendant and comments on the fact Defendant did not come in and voluntarily make a statement to the police.

Proposition of Law Four: A defendant was denied a fair trial when a Court permits evidence to be offered concerning efforts made by police to contact a defendant for a statement.

Proposition of Law Five: A defendant is denied a fair trial when the prosecutor elicits from a co-defendant that he has been convicted and a court gives no limiting instruction.

Proposition of Law Six: A defendant is denied due process of law when a Court refuses to instruct on the lesser-included offense of assault.

Proposition of Law Seven: A defendant is denied due process of law when a court improperly informs a jury concerning a presumption of aiding and abetting.

Proposition of Law Eight: A defendant is denied due process of law and a fair trial when a court instructs the jury that an "accomplice" had testified for the prosecution.

Proposition of Law Nine: A defendant is denied due process of law when the court would not instruct on a culpable mental state.

Proposition of Law Ten: A defendant is denied due process of law when a court improperly instructs a jury on flight.

Proposition of Law Eleven: A defendant is denied a fair trial when improper prosecutorial argument is made.

Proposition of Law Twelve: A newly enacted version of murder contained in §2903.02(B)(C) violates due process of law and equal protection of the law.

> Proposition of Law Thirteen: A defendant is denied due process of law when there is insufficient evidence to convict defendant as an aider and abettor.

(Exhibit 19). On July 17, 2001 the State filed a memorandum in opposition to jurisdiction. (Exhibit 20). On September 5, 2001, the Ohio Supreme Court denied leave to appeal and dismissed the appeal as not involving any substantial constitutional question. (Exhibit 21, Case No. 01-1108). This decision was not appealed to the United States Supreme Court.

B. Federal Action: Petition for Writ of Habeas Corpus

On August 6, 2002, Petitioner, through counsel, filed the instant Petition for Writ of Habeas Corpus, raising the following grounds for relief:

> GROUND ONE: Sixth Amendment.
> SUPPORTING FACTS: Petitioner was denied a fair and impartial jury. No black jurors were summoned to appear as jurors at petitioner's trial who was black or African-American. Moreover, prospective jurors who were called for the trial had recent exposure to the trial of a co-defendant and had information from that trial thus could not be fair and impartial.
>
> GROUND TWO: Fourteenth Amendment.
> SUPPORTING FACTS: Petitioner was denied due process of law when the court called a co-defendant, Richard T. Hayden, as a court's witness. This enhanced the credibility of Richard T. Hayden and prevented petitioner from having a fair trial.
>
> GROUND THREE: Fifth, Sixth and Fourteenth Amendments.
> SUPPORTING FACTS: Petitioner was denied due process of law and a fair trial when the court permitted questioning of petitioner when he testified as a witness and later commented on the fact that Petitioner did not

come forward and voluntarily make a statement to the police. Petitioner's right to a fair trial was further compromised when the court permitted evidence to be offered concerning alleged efforts made by the police to contact petitioner for a statement.

GROUND FOUR: Fourteenth Amendment.
SUPPORTING FACTS: Petitioner was denied a fair trial when the prosecutor was permitted to elicit from a co-defendant that he had been convicted and did not give any limiting instruction to the fact that the co-defendant had been convicted.

GROUND FIVE: Fourteenth Amendment
SUPPORTING FACTS: Petitioner was denied due process of law when the court refused to instruct on any lesser-included offense including the offense of assault. Petitioner's version of the events required that that be submitted to the jury.

GROUND SIX: Fourteenth Amendment
SUPPORTING FACTS: Petitioner was denied due process of law when the court improperly informed the jury concerning a presumption given to the state in proving aiding and abetting.

GROUND SEVEN: Fourteenth Amendment
SUPPORTING FACTS: Petitioner was denied due process of law and a fair trial when the court instructed the jury that an "accomplice" had testified for the prosecution thus implying that Petitioner was an accomplice of the witness.

GROUND EIGHT: Fourteenth Amendment
SUPPORTING FACTS: Petitioner was denied due process of law and a fair trial when the court would not instruct that the state had to prove a culpable mental state to convict petitioner. The court also so improperly

instructed the jury concerning flight when that was not an issue and deprived Petitioner of a fair trial.

GROUND NINE: Fourteenth Amendment
SUPPORTING FACTS: Petitioner was denied a fair trial when the prosecutor was permitted to make improper arguments to the jury, which inflamed the jury, misrepresented the evidence and also urged the jury to convict because Petitioner did not come in to make a statement to the police.

GROUND TEN: Fourteenth Amendment
SUPPORTING FACTS: Petitioner was denied due process of law and equal protection of the law when he was convicted of murder, which under Ohio statutory scheme, is the equivalent of involuntary manslaughter. Murder carries a penalty of fifteen (15) years to life. Involuntary manslaughter carries a maximum sentence of ten (10) years. Yet for the same elements Petitioner was sentenced to fifteen (15) years to life thus violating his right to due process of law and equal protection.

GROUND ELEVEN: Fourteenth Amendment
SUPPORTING FACTS: Petitioner was denied due process of law when there was insufficient evidence presented to convict Petitioner as an aider and abettor.

(Doc. 1, Petition).

III. AVAILABILITY OF TRANSCRIPTS

Complete copy of the Transcript of Proceedings, as filed in the Ohio Court of Appeals for the Eleventh Appellate District, have been filed under separate cover.

Pursuant to this Court's Show Cause Order of September 3, 2002 and the rules governing Section 2254 cases, Respondent respectfully submits the following:

IV. TRUE CAUSE OF DETENTION

The true cause of Petitioner's detention is attached as Respondent's Exhibit 7.

V. PREVIOUS FEDERAL PETITION

To the best of Respondent's knowledge, Petitioner has not filed a previous federal petition for writ of habeas corpus.

VI. STATUTE OF LIMITATIONS

The one-year statute of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. Petitioner's judgment of sentence was journalized on March 9, 1999. (Exhibit 7, Case No. 98 CR 429). A motion for judgment of acquittal, or in the alternative for new trial, was filed that same day. (Exhibit 8). The trial court's denial of the motion was journalized on April 14, 1999. (Exhibit 10). A notice of appeal was filed on May 10, 1999. (Exhibit 12). The Ohio Court of Appeals for the Eleventh Appellate District affirmed the judgment of conviction and sentence on May 14, 2001. (Exhibit 15, Case No. 99 L 075). On June 18, 2001, a notice of appeal and a memorandum in support of jurisdiction were filed in the Ohio Supreme Court. (Exhibits 18 & 19). On September 5, 2001, the Ohio Supreme Court denied leave to appeal and dismissed the appeal as not involving any substantial constitutional question. (Exhibit 21, Case No. 01-1108). This decision was not appealed to the United States Supreme Court within 90 days of journalization. The judgment of conviction and sentence, therefore, became final on December 4, 2001. Petitioner had one year, or until December 4, 2002, in which to file a federal habeas petition. No other collateral action served to toll or extend the limitations period.

Petitioner filed this petition on August 6, 2002. (Doc. 1, Petition). It therefore appears that the statute of limitation

does not bar further consideration of the instant federal petition for writ of habeas corpus.

VII. LAW & ARGUMENT

A. Standard of Review

Federal habeas corpus is available only to correct wrongs of constitutional dimension. 28U.S.C. § 2254(a); *Smith v. Phillips*, 455 U.S. 209 (1982); *Barclay v. Florida*, 463 U.S. 939 (1983). "[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Also, it is the obligation of the federal courts to accept as valid a state court's interpretation under state law of the statutes and rules of practice of that state. *Duffel v. Dutton*, 785 F.2d 131, 133 (6th Cir. 1986). A federal habeas court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States. 28 USC § 2241; *Estelle v. McGuire, supra.*

Petitioner is not entitled to federal habeas corpus relief, unless the state court's adjudication of a federal question resulted in a decision that (1) was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court, or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. *See* 28 U.S.C. § 2254(d); *see also Williams v. Taylor*, 529 U.S. 362, 402-03 (2000) (O'Connor, J., writing for the majority on this issue); *Harris v. Stovall*, 212 F.3d 940, 942 (6th Cir. 2000), *cert. denied*, 532 U.S. 947 (2001); *Harpster v. Ohio*, 128 F.3d 322, 326 (6th Cir. 1997), *cert. denied*, 522 U.S. 1112 (1998). A state court decision is "contrary to" clearly established federal law as determined by the United States Supreme Court under § 2254(d)(1) if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or decides a case differently than the

Supreme Court has on a set of materially indistinguishable facts. *Williams*, 529 U.S. at 405-06 (O'Connor, J.); *Harris*, 212 F.3d at 942.

An "unreasonable application" of Supreme Court precedent occurs (1) if the state court identifies the correct legal standard but unreasonably applies it to the facts of the case, or (2) if the state court either unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. *Williams*, 529 U.S. at 407-08 (O'Connor, J.). Under § 2254(d)(1), the unreasonable application clause, a federal habeas court "may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411 (O'Connor, J.); *see also McGhee v. Yunkins*, 229 F.3d 506, 510 (6th Cir. 2000); *Harris*, 212 F.3d at 942. The reasonableness inquiry is an objective one. It does not involve a subjective inquiry into whether or not reasonable jurists would all agree that the state court's application was unreasonable. *Williams*, 529 U.S. at 409-10 (O'Connor, J.); *see also Washington v. Hofbauer*, 228 F.3d 689, 698 (6th Cir. 2000); *Harris*, 212 F.3d at 942-43. Moreover, the writ may issue only if the application is objectively unreasonable "in light of the holdings, as opposed to the dicta, of the Supreme Court's decisions as of the time of the relevant state court decision." *McGhee*, 229 F.3d at 510, 512 (citing *Williams*, 529 U.S. at 412).

If the petitioner challenges the state court's determination of the facts rather than its application of law, the § 2254(d)(2) applies. The writ will issue only if the state court made an unreasonable determination of the facts in light of the evidence presented. The habeas court must presume the correctness of the factual findings made by the state court. *Warren v.*

Smith, 151 F.3d 358, 360 (6th Cir. 1998) (citing 28 U.S.C. § 2254(e)(1)). To rebut this presumption, the petitioner must present clear and convincing evidence to the contrary. *Id.* at 360-61.

The Sixth Circuit Court of Appeals held, in *Harris v. Stovall, supra*, that the standards of 28 U.S.C. § 2254(d) apply even when there is no state court decision to evaluate. The Sixth Circuit went on to hold that the federal habeas court's review would not be a full *de novo* review of the claims, but "remains deferential because the court cannot grant relief unless the state court's result is not in keeping with the strictures of the AEDPA." *Id.* Thus, where a state court decides a constitutional issue by form order or without an extended discussion, "a habeas court should then focus on the *result* of the state court's decision, applying the standard articulated [in *Williams*]." *Id.*, fn. 1.

In the instant petition, Petitioner presents both federal questions and state law claims that have been previously addressed on the merits by the state courts on direct appeal. Respondent submits that Petitioner's state law claims should be dismissed as non-cognizable grounds for federal habeas relief. Respondent further submits that those claims presented as federal questions or, which give rise to concerns of due process and fundamental fairness, should be denied as each has been found to be without merit in the state courts, pursuant to a reasonable application of clearly established federal law.

B. Jury Venire

As his *first ground for relief*, Petitioner alleges that he was denied a fair and impartial jury venire, from which to select the jury that would hear his case. (Doc. 1, Petition at p. 6). Similar claims were raised as the first assignment of error on direct appeal to the state appellate court and the first proposition of law in support of jurisdiction in the Ohio Supreme

Court. (Exhibits 13 & 19). In particular, Petitioner complains that: (1) the venire did not include any African-Americans; and (2) the prospective jurors had recent exposure to the separate trial of a co-defendant, Michael Love.

The United States Supreme Court has held that a petit jury venire must represent a fair cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 528-9 (1975). The Court in *Taylor* also held that there is no constitutional right to a jury of any particular composition. 419 U.S. at 538. The Court has further held that the fair cross-section requirement does not apply to petit juries themselves, largely because it would restrict the peremptory challenge device. *Holland v. Illinois*, 493 U.S. 474, 480-4 (1990).

The Court has further held that a defendant establishes a *prima facie* violation of the fair cross-section requirement when he shows that the group excluded is (1) distinctive; (2) not fairly represented in the venire from which the petit jury is chosen; and (3) that the under-representation resulted from a systematic exclusion of the group in the jury selection process. *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

Citing state case law, which applies and follows the *Duren* decision, the state appellate court concluded, as follows:

> In the instant case, appellant has not demonstrated that the representation of African-Americans in the jury venires is not fair and reasonable in relation to the number of such persons in Lake County. Furthermore, appellant has not presented any evidence from which we can infer that the number of African-Americans included in jury venires in Lake County is due to systematic exclusion of this racial group in the jury selection process. Therefore, we cannot conclude that appellant's Sixth Amendment right to have a jury comprised of a fair cross-section of the community was violated.

(Exhibit 15 at p. 6). In this case, Petitioner's bare assertions do not satisfy the *Duren* test. Indeed, the assertions are unsupported by any evidence whatsoever and constitute nothing more than an attempt to create a constitutional issue where none exist. Inasmuch as no systematic exclusion of African-Americans can be shown in this case, this claim lacks merit and should be denied.

Although the docket does not reflect any effort by the defense to seek a change of venue, Petitioner argues that he was denied a fair trial because the prospective jurors had recent exposure to the separate trial of a co-defendant. Additionally, it is critical to note that following extensive questioning during voir dire, none of the prospective jurors indicated that they had formed opinions based upon their exposure to publicity relating to the other case. It would be inappropriate to challenge for cause, where a prospective juror is merely aware of the circumstances or outcome of a co-defendant's previous trial and has not formed an opinion as to the defendant's guilt. Reviewing this same claim on direct appeal, the state appellate court noted that:

> [M]ere exposure to pre-trial publicity does not necessarily taint a jury venire. Prospective jurors who are merely aware of some of the publicized circumstances of a crime but have not previously formed or expressed opinions with respect to the defendant's guilt are not subject to challenges for cause during voir [dire] when the trial court is satisfied from their examination that they can be impartial. [*citing, State v. Duerr*, 8 Ohio App.3d 404 (1982)].
>
> In the instant case, a review of voir dire reveals that none of the jurors at appellant's trial indicated that they had formed an opinion as to appellant's guilt prior to the commencement of the trial. We cannot conclude that appellant was denied a fair and impartial jury due to the jurors' exposure to pretrial publicity.

(Exhibit 15 at p. 6). Petitioner's claim fails to establish a denial of fundamental fairness or violation of due process and is therefore not entitled to habeas relief.

Respondent submits that Petitioner's *first ground for relief*, asserting claims with respect to the jury venire, fails on the merits and should therefore be denied.

C. Evidentiary Ruling

As his *second ground for relief*, Petitioner alleges that he was denied due process of law when the trial court called co-defendant Richard Hayden as a court's witness. (Doc. 1, Petition at p. 5). Similar claims were raised unsuccessfully as the second assignment of error on direct appeal to the state appellate court and the second proposition of law in support of jurisdiction in the Ohio Supreme Court. (Exhibits 13 & 19). In essence, Petitioner challenges the trial court's evidentiary ruling, pursuant to Evid. R. 614(A), which permitted both parties to "cross-examine" the witness. Respondent submits that this claim asserts an abuse of discretion that has been found to be without merit on direct appeal in the state courts, and is therefore not cognizable for purposes of federal habeas review. *Norris v. Schotten*, 146 F.3d 314, 328 (6th Cir. 1998), *cert. denied*, 525 U.S. 935 (1998), citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Hutchinson v. Marshall*, 744 F.2d 44, 46-47 (6th Cir. 1984), *cert. denied*, 469 U.S. 1221 (1985).

The Ohio Court of Appeals for the Eleventh Appellate District, being the only state court to reach the merits of this claim, opined:

> In the instant case, we cannot conclude that the trial court abused its discretion by calling Hayden as a court's witness. The prosecutor informed the trial court that counsel for Hayden had indicated that Hayden would not cooperate with the prosecution. Hayden's testimony at trial affirms the prosecutor's assessment that Hayden

> would not have cooperated with the state. *** Hayden had written a letter *** that he would try to help *** [petitioner] during [his trial]. The trial court was reasonably justified in believing that calling Hayden, who had previously been convicted of murder for his participation in the attack on [the victim], as a court's witness would benefit the jury in performing its fact-finding responsibilities.

(Exhibit 15 at pp. 8-9). Evid.R. 614(A) does not require a showing of surprise or inconsistency before the court calls a witness on its own. The trial court's decision to call its own witness will not be reversed, absent a showing of an abuse of discretion. *State v. Adams*, 62 Ohio St.2d 151, 157. The trial court does not abuse its discretion if it is reasonably justified in believing that the calling of this person as a court witness "would be beneficial to the jury in performing its fact-finding responsibilities." *Id.* at 158.

With respect to state court evidentiary rulings, the Sixth Circuit has held that habeas review is extremely limited. *Waters v. Kassulke*, 916 F.2d 329, 335 (6th Cir. 1990). Petitioner is entitled to federal habeas corpus relief only where a state's evidentiary rule resulted in the denial of fundamental fairness, and therefore, a violation of due process. *Brown v. O'Dea*, 187 F.3d 572, 578 (6th Cir. 1999); *See also Wrigth v. Dallman*, 999 F.2d 174, 178 (6th Cir. 1993); *Cooper v. Sowder*, 837 F.2d 284, 287 (6th Cir. 1988).

Additionally, it should be noted that the Federal Rules of Evidence are not constitutionally based. *Dowling v. US.*, 493 U.S. 342 (1990). It follows that if the Rules of Evidence are not constitutionally mandated, then they cannot dictate constitutional results. Because federal habeas corpus relief does not lie for errors of state law, the federal court must respect state court findings of fact and application of its own law, rather than engage in *de novo* review. *Lewis v. Jeffers*, 497

U.S. 764, 780 (1990). It may not "peer majestically over the [state] court's shoulder in order to second-guess the facts." *Id.*

Even if it was successfully argued that the trial court's evidentiary ruling was an abuse of discretion, or in violation of state law, Petitioner has failed to establish that said violation resulted in the denial of fundamental fairness, and therefore, a violation of due process. Only then, would Petitioner be entitled to federal habeas corpus relief *Brown v. O'Dea, supra.* It is respectfully submitted that this Honorable Court has no basis for disputing the state court's interpretation of its own law. As such, Petitioner's *second ground for relief* should be denied.

D. Relevant Evidence

As his *third ground for relief*, Petitioner alleges that he was denied due process of law when the trial court permitted questioning about his failure to come forward and make a statement to the police. Additionally, Petitioner argues that the trial court erred by permitting the State to present evidence of the police's efforts to contact him during the investigation. (Doc. 1, Petition at p. 6). Similar claims were raised unsuccessfully as the third and fourth assignments of error on direct appeal to the state appellate court and the third and fourth propositions of law in support of jurisdiction in the Ohio Supreme Court. (Exhibits 13 & 19). Respondent submits that petitioner's claims are without merit and should be denied.

Petitioner's argument on direct appeal cited case law, which stood for the proposition that the State may not impeach the accused with evidence of his *post arrest* silence. (*See*, Exhibit 13 at pp. 9-10). In view of the relevant facts and circumstances, Petitioner's reliance on this line of cases is misplaced. The state appellate court concluded:

> In the instant case, the prosecution did not attempt to impeach appellant by claiming that he failed to make a

> statement to the police after he was arrested. Rather, the prosecution presented evidence that appellant did not come forward to make a statement to the police until nearly two months after the incident, even though he was aware that the police were looking for him. The evidence elicited by the state was permissible because it was relevant to prove that appellant was attempting to evade the police. Appellant's third and fourth assignments of error have no merit.

(Exhibit 15 at pp. 9-10). Clearly, this evidence was relevant and the trial court did not err by permitting the prosecution to pursue this line of questioning.

Respondent submits that petitioner's *third ground for relief* is without merit and should be denied.

E. Jury Instructions

Petitioner's *fourth, fifth, sixth, seventh, and eighth grounds for relief* each allege that the trial court erred when instructing the jury prior to deliberations. (Doc. 1, Petition at pp. 6 & 6A). The respective claims were raised unsuccessfully as the fifth through ninth assignments of error on direct appeal to the state appellate court and the fifth through ninth propositions of law in support of jurisdiction in the Ohio Supreme Court. (Exhibits 13 & 19). Respondent submits that these claims are without merit, as well as being non-cognizable on habeas review, and should therefore be denied.

Alleged errors in jury instruction normally do not rise to the level of federal constitutional violations. *See Engle v. Isaac*, 456 U.S. 107 (1982); *Turoso v. Cleveland Municipal Court*, 674 F.2d 486 (6th Cir.), *cert. denied*, 459 U.S. 880 (1982); *Eberhardt v. Bordenkircher*, 605 F.2d 275 (6th Cir. 1979); *Weston v. Rose*, 527 F.2d 524 (6th Cir. 1975). The petitioner must show that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973),

quoted in *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). Thus, in order to warrant habeas relief, jury instructions must not only have been erroneous, but also, taken as a whole, so infirm that they rendered the entire trial fundamentally unfair. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *Henderson*, 431 U.S. at 154; *Wood v. Marshall*, 790 F.2d 548, 551-52 (6th Cir. 1986); *Austin v. Bell*, 126 F.3d 843, 846 (6th Cir. 1997), *cert. denied* 118 S. Ct. 1547 (1998). Finally, if an instruction is ambiguous and not necessarily erroneous, it violates the Constitution only if there is a reasonable likelihood that the jury applied the instruction improperly. *Estelle*, 502 U.S. at 72-73 n.4; *Austin*, 126 F.3d at 846.

The question whether jury instructions deprived a petitioner of due process or of some other constitutional rights is a mixed question of law and fact. Thus, under the new standards of review set forth in 28 U.S.C. § 2254(d)(1), a writ of habeas corpus may be issued only where the court finds that the state court decision involved an unreasonable application of clearly established federal law as determined by the Supreme Court. A state court application of law to facts is unreasonable only if it is so clearly incorrect that it would not be debatable among reasonable jurists. *Lindh v. Murphy*, 96 F.3d 856, 869-70 (7th Cir. 1996) (en banc), *reversed on other grounds*, 117 S. Ct. 2059 (1997).

As his *fourth ground for relief*, Petitioner maintains that evidence of the co-defendant's conviction for the same offense left the jury with the obvious inference that because the co-defendant had been convicted of murder, that Petitioner, being prosecuted as his aider and abettor, must also be guilty. The state appellate court's review of this claim revealed that defense counsel "opened the door" by inquiring about prior convictions. Only upon re-cross examination, did the State, pursuant to Evid. R. 609, question the co-defendant about the murder conviction, which he failed to mention when responding to defense counsel's initial inquiry about prior convic-

tions. (Exhibit 15 at pp. 10-11; *See*, Transcript Vol. I at pp. 140, 148-50, 15152). Finding the claim to be without merit, the state appellate court concluded that "[i]t is well established that '[a] party cannot take advantage of an error he invited or induced.' *State v. Seiber*, 56 Ohio St.3d 4, 17 (1990)." (Exhibit 15 at p. 11).

As his *fifth ground for relief*, Petitioner argues that the trial court erred by not instructing the jury on the lesser-included offense of assault. In essence, Petitioner contends that while he admittedly kicked the victim, there was no evidence that this was the fatal blow. However, Petitioner was charged and convicted as an accomplice in the commission of felony-murder, pursuant to O.R.C. § 2903.02(B). The theory of the State's case was that Petitioner aided and abetted Richard Hayden, the principal offender, in the commission of the underlying felony of felonious assault, which was the proximate cause of the victim's death. Under these circumstances, the state appellate court properly concluded that it is irrelevant "whether or not Petitioner administered the actual blow that caused the victim's death." (Exhibit 15 at p. 12). Respondent submits that an instruction on the lesser-included offense of misdemeanor assault was not warranted.

As his *sixth ground for relief*, Petitioner claims that the trial court improperly informed the jury regarding a presumption of aiding and abetting. Petitioner takes issue with the following excerpt from the jury charge:

> Thus, participation in criminal intent may be inferred from the presence, companionship and conduct before and after the offense is committed.

(Transcript Vol. III at p. 536). The excerpt in question is clearly taken out of context and turns a blind eye to the court's two and one-half page instruction on the concept of aiding and abetting. (*See*, Transcript Vol. III at pp. 534-36). Reviewing this same claim on direct appeal, the state appellate court concluded, as follows:

> Appellant fails to acknowledge that the trial court instructed the jury that 'mere presence is not enough to make [appellant] an accomplice ***.' When the entire jury instruction is considered, it is clear that there was no error in this regard.

(Exhibit 15 at pp. 12-13). Respondent submits that the trial court's instruction was not in error.

As his *seventh ground for relief*, Petitioner claims that the trial court erred by indicating that an "accomplice" had testified, thus implying that Petitioner was an accomplice of the witness. This claim was raised unsuccessfully as the eighth assignment of error on direct appeal in the state appellate court as well as the eight proposition of law in support of jurisdiction in the Ohio Supreme Court. (Exhibits 13 & 19). Petitioner argued on direct appeal that it was a question of fact for the jury to decide whether or not Richard Hayden was an accomplice. (*See*, Exhibit 13 at pp 19-21). The state appellate court correctly concluded that the trial court was statutorily obliged to give an instruction on the testimony of an accomplice. (*See*, Exhibit 15 at pp. 13-14).

O.R.C. § 2923.03(D) provides:

> If an alleged accomplice of the defendant testifies against the defendant in a case in which the defendant is charged with complicity in the commission of or an attempt to commit an offense, an attempt to commit an offense, or an offense, the court, when it charges the jury, shall state substantially the following:
>
> "The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution.

> It is for you, as jurors, in the light of all the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth."

The state appellate court concluded that the trial court's failure to refer to the witness as an "alleged" accomplice, if error, was harmless. (Exhibit 15 at p. 14). Respondent submits that the statement and instructions of the trial court, with regard to accomplice testimony, were consistent with the statutory requirement and do not give rise to concerns of fundamental fairness or a violation of due process.

As his *eighth ground for relief*, Petitioner contends that the trial court erred by: (1) failing to instruct the jury on a culpable mental state; and (2) instructing the jury concerning flight. These claims were raised unsuccessfully as the ninth and tenth assignments of error on direct appeal in the state appellate court as well as the ninth and tenth propositions of law in support of jurisdiction in the Ohio Supreme Court. (Exhibits 13 & 19).

Contrary to Petitioner's arguments, both on direct appeal and in the instant petition, the state did not have to prove that he knowingly caused the death of the victim. Having charged Petitioner with felony murder, based on the underlying offense of felonious assault, it was incumbent upon the State to show that Petitioner, as either a principal or an accessory, knowingly caused serious physical harm to the victim, proximately resulting in the victim's death. The state appellate court properly concluded that, "the trial court's jury instruction was proper since the trial court did instruct the jury on *mens rea* for felonious assault." (Exhibit 15 at p. 15).

Petitioner maintains that the trial court erred by instructing the jury on flight as evidence of consciousness of guilt. This procedurally defaulted claim was raised as the tenth assignment of error on direct appeal. (Exhibit 13 at pp. 23-24).

Noting that no contemporaneous objection had been made to the jury charge, the state appellate court proceeded with plain error analysis. Although finding that the trial court erred, the state appellate court concluded, in light of the overwhelming evidence of guilt, that the error was harmless. (Exhibit 15 at pp. 15-16).

In the Sixth Circuit, plain error review by a state appellate court does not open a claim to consideration by a federal habeas court when the state court rests its decision on a procedural bar. *Paprocki v. Foltz*, 869 F.2d. 281, 284-5 (6th Cir. 1989); *see also Amos v. Scott*, 61 F.3d. 333, 342 (5th Cir.) *cert. denied*, 516 U.S. 1005 (1995). Respondent submits that Petitioner's claim regarding the jury instruction on flight is waived for purposes of federal habeas review by reason of procedural default in the state courts. Alternatively, when viewed in the context of the trial as a whole, the instruction in question was not so egregious as to render the entire trial fundamentally unfair.

Respondent submits that the foregoing claims, raised as the *fourth, fifth, sixth, seventh and eighth grounds for relief*, are without merit, as well as being non-cognizable for purposes of habeas review, and should therefore be denied.

F. Prosecutorial Misconduct

As his *ninth ground for relief*, Petitioner alleges that he was denied a fair trial when the prosecutor was permitted to make improper arguments to the jury. (Doc. 1, Petititon at p. 6A). Similar claims were raised unsuccessfully as the eleventh assignment of error on direct appeal to the state appellate court and as the eleventh proposition of law in support of jurisdiction in the Ohio Supreme Court. (Exhibits 13 & 19). Respondent submits that none of Petitioner's claims of prosecutorial misconduct were so egregious as to render the entire trial fundamentally unfair.

On habeas corpus review, the standard to be applied to claims of prosecutorial misconduct is whether the conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process," *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *Darden v. Wainright*, 477 U.S. 168 (1986) or whether it was "so egregious as to render the entire trial fundamentally unfair." *Cook v. Bordenkircher*, 602 F. 2d 117 (6th Cir. 1979), *cert. denied*, 444 U.S. 936 (1979); accord *Summitt v. Bordenkircher*, 608 F. 2d 247 (6th Cir. 1979), *aff'd sub nom. Watkins v. Sowders*, 449 U.S. 341 (1981); *Stumbo v. Seabold*, 704 F. 2d 910 (6th Cir. 1983). The federal habeas court must first determine whether the challenged statements were indeed improper. *United States v. Francis*, 170 F.3d 546, 549 (6th Cir. 1999). Upon a finding of such impropriety, the habeas court should next "look to see if they were flagrant and warrant reversal." *United States v. Carroll*, 26 F.3d 1380, 1388 (6th Cir. 1994). Flagrancy is determined by an examination of four factors:

> In every case, we consider the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused; whether they are isolated or extensive; whether they were deliberately or accidentally placed before the jury, and the strength of the competent proof to establish the guilt of the accused.

Serra v. Michigan Department of Correction, 4 F.3d 1348, 1355-56 (6th Cir. 1993) (quoting *Angel*, 682 F. 2d at 608); *See also United States v. Carroll, supra; United States v. Francis, supra.* Furthermore, the misconduct must be so gross as to probably prejudice the defendant. *Prichett v. Pitcher*, 117 F. 3d 959, 964 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 572 (1997); *United States v. Ashworth*, 836 F. 2d 260, 267 (6th Cir. 1988).

On direct appeal, Petitioner made specific reference to the prosecutor's objectionable remarks, to wit: (1) Petitioner's failure to turn himself in and make a statement; (2) the

prosecutor stated that Petitioner is guilty; (3) the prosecutor paraphrased anticipated jury instructions for aiding and abetting; (4) the prosecutor maligned defense counsel for his interpretation of the evidence. (Exhibit 13 at pp. 25-27). Following its own review of the prosecutor's remarks, the Ohio Court of Appeals for the Eleventh Appellate District reached the following decision:

> After reviewing the prosecutorial comments of which appellant complains, we cannot conclude that any of them prejudicially affected the substantial right of appellant. The strength of the evidence against appellant and the trivial nature of the prosecutor's comments militate against a conclusion that appellant was prejudiced by any of the prosecutor's arguments. Therefore, appellant's eleventh assignment of error has no merit.

(Exhibit 15 at p. 17). Traditionally, courts have allowed prosecutors wide latitude in closing arguments. A prosecutor's closing argument should not be considered improper unless it is "so agregious as to render the entire trial fundamentally unfair." *Cook v. Bordenkircher, supra.* The closing argument must be viewed in the broader context of the entire trial, the arguments of both counsel, and the jury instructions given by the trial judge. Finally, and crucially, proof of guilt was overwhelming.

The Petitioner has failed to show that any of the prosecutor's remarks infected the trial with unfairness or was so egregious as to render the resulting conviction a denial of due process. Nor has Petitioner demonstrated that the State court adjudication on this issue resulted in a decision that was contrary to, or involved an unreasonable application of, United States Supreme Court precedent. In view of the reasons stated herein, it is respectfully submitted that Petitioner's *ninth ground for relief* should be denied.

G. Felony-Murder Statute

As his *tenth ground for relief*, Petitioner alleges that he was denied equal protection and due process of law when he was indicted for, and convicted of, murder, which he alleges is the equivalent of involuntary manslaughter. (Doc. 1, Petition at p. 6A). Similar claims were raised unsuccessfully as the twelfth assignment of error on direct appeal to the state appellate court and the twelfth proposition of law in support of jurisdiction in the Ohio Supreme Court. (Exhibits 13 & 19). In essence, Petitioner challenges the constitutionality of Ohio's statutory scheme for the offense of felony murder, because it alleviates the State's burden of proving any culpable mental state and requires harsher punishment for conduct that would otherwise constitute involuntary manslaughter. Respondent submits that that this claim is without merit and should therefore be denied.

O.R.C. § 2903.02(B) provides that:

> No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of Section 2903.03 or 2903.04 of the Revised Code.

To be convicted of felony-murder, under O.R.C. § 2903.02(B), one must have committed or attempted to commit an offense of violence that is a felony of the first or second degree. Involuntary manslaughter, on the other hand, only requires that the offender commit or attempt to commit a felony. *See*, O.R.C. § 2903.04. Respondent submits that the two offenses are easily distinguished and that the disparate penalties are justified. Petitioner's argument to the contrary is without merit.

On direct appeal, the Eleventh District Court of Appeals held that Ohio's felony murder statute "does not relieve the State of the burden of proving *mens rea* because the intent to

kill is conclusively presumed so long as the State proves the required intent to commit the underlying felony." (Exhibit 15 at p. 18). The state appellate court concluded that Petitioner's due process rights were not violated as the State satisfied the *mens rea* requirement by proving that Petitioner aided and abetted in the commission of the underlying offense of felonious assault. *Id.* The United States Supreme Court has definitively stated that, "prosecutors do not need to prove a culpable mental state with respect to the murder because intent to kill is conclusively presumed if the State proves intent to commit the underlying felony." *Hopkins v. Reeves*, 524 U.S. 88, 91-92 (1998). (Citations omitted).

Petitioner also argued on direct appeal that O.R.C. § 2903.02(B) is unconstitutional in that it creates two classes of individuals who may be convicted of murder, one who acts "purposely" and another who must cause the death of another in the commission, or attempted commission, of a specified act of violence. (Exhibit 13 at p. 30). The state appellate court concluded that O.R.C. § 2903.02(B) does not violate the equal protection clause as no suspect class or fundamental right is involved. Additionally, the state appellate court held that the statute, "which severely punishes offenders whose commission or attempted commission of first or second degree felonies of violence results in death of their victims, bears a rational relationship to the government's legitimate interest of protecting the safety of its citizens." (Exhibit 15 at pp. 18-19).

The federal Constitution does not prohibit states from enacting felony-murder statutes. In fact, the United States Supreme Court has stated "[t]hat States have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony murder statutes is beyond constitutional challenge." *Lockett v. Ohio*, 438 U.S. 586, 602 (1978). Further, "[n]othing in the United States Constitution deprives legislatures of the power to impose

upon those who kill their victims in the course of inherently dangerous felonies the same sanctions they choose for those who kill their victims after meditation sufficient to satisfy the jurisdiction's definition of first-degree murder." *People of Guam v. Root*, 524 F.2d 195, 197 (9th Cir. 1975).

Respondent submits that Petitioner's *tenth ground for relief* is without merit and should, therefore, be denied.

H. Sufficiency of the Evidence

As his *eleventh ground for relief*, Petitioner contends that his conviction for felony-murder, as an aider and abettor, is not supported by sufficient evidence. (Doc. 1, Petition at p. 6A). Similar claims were raised as the thirteenth assignment of error on direct appeal to the state appellate court and the thirteenth proposition of law in support of jurisdiction in the Ohio Supreme Court. (Exhibits 13 & 19). Respondent submits that Petitioner's claim is without merit and should be denied.

An allegation that the verdict was entered upon insufficient evidence states a claim under the due process clause of the Fourteenth Amendment to the United States Constitution. *Jackson v. Virginia*, 443 U.S. 307, *reh'g denied*, 444 U.S. 890 (1979); *In re Winship*, 397 U.S. 358 (1970). On federal habeas corpus review, the same standard of review for the sufficiency of the evidence applies as on direct appeal. *Mikes v. Borg*, 947 F.2d 353, 356 n.5 (9th Cir. 1991). In other words, the petitioner is entitled to relief only if it is found "that upon the record of evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson*, 443 U.S. at 324; *State of Ohio v. Jenks* (1991), 61 Ohio St. 3d 259, 274, 574 N.E.2d 492, 504. On federal habeas review, it is not required that all possible interpretations of the evidence except guilt beyond a reasonable doubt be ruled out and the reviewing court need not be convinced of the defendant's guilt beyond a reasonable

doubt. *Scott v. Perini*, 662 F.2d 428, 431 (6th Cir. 1981), *cert. denied*, 456 U.S. 909 (1982); *Delk v. Atkinson*, 665 F.2d 90, 100 (6th Cir. 1981) (holding that the Fourteenth Amendment imposes "no requirement that all other interpretations of the evidence except guilt of the defendant be ruled out").

The evidence is to be viewed in the light most favorable to the government, and every reasonable inference from the evidence presented must be drawn in favor of the prosecution. *Jackson*, at 319; *United States v. Strong*, 702 F.2d 97, 99-100 (6th Cir. 1983); *Fuller v. Anderson*, 662 F.2d 420, 423 (6th Cir. 1981), *cert. denied*, 455 U.S. 1028 (1982). Before the state courts, any conflicting inferences arising from the record, including credibility conflicts, must be resolved in favor of the state. *Walker v. Engle*, 703 F.2d 959, 969 (6th Cir.), *cert. denied*, 464 U.S. 962 (1983). However, on habeas review, the District Court cannot weigh the credibility of the witnesses. *Walker v. Engle*, 703 F.2d at 970. Nor is the District Court permitted to overturn a conviction merely because it would have acquitted had it acted as the finder of fact. *Brown v. Davis*, 752 F.2d 1142, 1147 (6th Cir. 1985); *Walker*, 703 F.2d at 969.

The Sixth Circuit has held that in reviewing a motion for acquittal based on insufficient evidence, the court must decide if there was sufficient basis for the jury to make its decision and great deference must be given to the decision of the trier of fact. *United States v. Collon*, 426 F.2d 939, 942 (6th Cir. 1970); *accord United States v. Prieur*, 429 F.2d 1237, 1238 (6th Cir. 1970). State court findings of fact, including summaries by the court, are entitled to a presumption of correctness in a federal habeas corpus proceeding. 28 U.S.C. § 2254(d); *Marshall v. Lonberger*, 459 U.S. 422, 435 (1983); *Sumner v. Mata*, 449 U.S. 539 (1981), *reaffirmed*, 455 U.S. 591 (1982). Also, it is the obligation of the federal courts to accept as valid a state court's interpretation under state law of the statutes and rules of practice of that state.

Duffel v. Dutton, 785 F.2d 131, 133 (6th Cir. 1986). The question of whether evidence is sufficient to support a conviction is a mixed question of law and fact. 28 U.S.C. § 2254(d). A state court application of law to facts is unreasonable only if it is so clearly incorrect that it would not be debatable among reasonable jurists. *Lindh v. Murphy*, 96 F.3d 856, 869-70 (7th Cir. 1996)(en banc), *reversed on other grounds*, 117 S. Ct. 2059 (1997).

Ohio's felony-murder statute requires that the underlying offense be *an offense of violence that is a felony of the first or second degree. See*, O.R.C. § 2903.02(B). On direct appeal, Petitioner initially argued that the felony-murder statute should not apply to him because he was charged with an *attempt* to commit felonious assault, which is only a felony of the third degree. In this regard, the state appellate court held, as follows:

> Under the plain language of the statute, an attempt to commit a felony of the second degree that proximately results in the death of another qualifies an offender for the offense of felony murder. Furthermore, appellant was convicted of aiding and abetting in a felonious assault that proximately resulted in the death of another; therefore, the charge of felony murder was applicable to appellant.

(Exhibit 15 at p. 19). Not only is Petitioner's initial claim factually incorrect but also, it blatantly misconstrues the language of the statute.

Further, Petitioner maintained on direct appeal that the State presented insufficient evidence to prove that he aided and abetted the principal offender because he merely kicked the victim and was in the car at the time that the fatal blows were administered. Having stated the applicable legal standard, and upon review of the evidence, the state appellate court concluded that the trial court properly denied the

defendant's motion for acquittal "because the jury could have found that the essential elements of aiding and abetting in the offense of felony murder were proved beyond a reasonable doubt." (Exhibit 15 at p. 21). The state appellate court referred to the following evidence in support of the conviction:

> The State presented evidence that appellant aided and abetted Hayden in committing the felonious assault on Olie Gipson. Richard Hayden testified that appellant threw the first punch at Gipson, which caused him to flinch forward and then Damon Anderson punched him twice. Barbara Adeyemi testified that appellant and Anderson continuously beat Gipson by stepping on him and kicking him while Hayden was stomping on his head.

(Exhibit 15 at p. 22). Viewing the evidence in a light most favorable to the prosecution, a reasonable jury could have concluded that Petitioner was guilty of aiding and abetting in a felonious assault that proximately resulted in the death of Olie Gipson. *Jackson, supra.*

Petitioner fails to show that the state appellate court's decision was contrary to, or involved an unreasonable application of, clearly established federal law, or an unreasonable determination of facts, which would justify granting habeas relief. *Harris v. Stovall, supra.* Respondent submits that Petitioner's *eleventh ground for relief* is without merit and should, therefore, be denied.

VIII. CERTIFICATE OF APPEALABILITY

> Petitioner has failed to raise issues, which have substantial merit, that are worthy of further consideration, and on which reasonable jurists could differ. Therefore, a certificate of appealability should not issue on any ground asserted in this habeas petition.

District courts have the power to issue certificates of appealability under the AEDPA in Section 2254 cases. *Lyons v. Ohio Adult Parole Auth.*, 105 F.3d 1063 (6th Cir. 1997); *Hunter v. United States*, 101 F.3d 1565 (11th Cir. 1996) (en banc). Likewise, district courts are to be the initial decision-makers on certificates of appealability under Section 2255. *Kincade v. Sparkman*, 117 F.3d 949 (6th Cir.) (adopting analysis in *Lozada v. United States*, 107 F.3d 1011, 1017 (2d Cir. 1997)). Under Rule 10 of the Rules Governing Section 2254 Proceedings, the issuance or denial of a certificate of probable cause may be determined by a United States Magistrate Judge.

28 U.S.C. § 2253 as amended by AEDPA, provides in pertinent part:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (c)(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (c)(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Thus, a person in custody upon a state conviction seeking to appeal an adverse ruling on a petition for writ of habeas corpus in the district court must obtain a certificate of appealability, (formerly called a certificate of probable cause), before proceeding. 28 U.S.C. § 2253; Fed. R. App. P. 22. Respondent submits that Petitioner has not and cannot make a

substantial showing of the denial of a constitutional right. Therefore, Respondent submits that a certificate of appealability should not issue on any issue presented in the instant petition.

IX. CONCLUSION

Respondent submits that Petitioner's state law claims should be dismissed as non-cognizable grounds for federal habeas relief. Respondent further submits that those claims presented as federal questions or, which give rise to concerns of due process and fundamental fairness, should be denied as each has been found to be without merit in the state courts, pursuant to a reasonable application of clearly established federal law. Additionally, Respondent submits that a certificate of appealability should not be issued.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Answer/Return of Writ* was filed electronically and forwarded to Counsel for Petitioner, Paul A. Mancino, Jr., Suite 1016, 75 Public Square, Cleveland, Ohio 44113 by U.S. mail, postage pre-paid this 24th day of October, 2002.

s/BRUCE D. HORRIGAN
BRUCE D. HORRIGAN
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:02CV1520
(JUDGE DONALD C. NUGENT
MAGISTRATE JUDGE JACK B. STREEPY

KEITH BOWLES,
Petitioner,

vs.

HARRY RUSSELL, Warden,
Respondent.

TRAVERSE AND BRIEF OF PETITIONER

Now comes petitioner, Keith Bowles, and for his traverse and brief in response to the return of writ filed by respondent and denies all new matters contained therein except that which may constitute admissions.

Petitioner is before this court seeking a writ of habeas corpus with respect to the judgment and sentence entered by the Court of Common Pleas of Lake County in which petitioner was sentenced to a term of imprisonment of fifteen (15) years to life for being convicted of murder in violation of §2903.02 of the Ohio Revised Code. In support of his petition petitioner advanced several grounds for relief

I

Petitioner, has asserted he was denied a fair and impartial jury. No black jurors were summoned to appear as jurors at petitioner's trial who is a black or African-American. In addition, jurors who were summoned for the trial had recent exposure to a trial of a co-defendant and had information from that trial and thus could not be fair and impartial.

This case was tried after another case involving a shooting committed by Michael Love almost simultaneously and at the same location (Supp.Tr.12, 50, 53-54, 56-57, 94-95). This tainted the entire jury pool. To be impartial jurors must posses a ". . . mental attitude of appropriate indifference, . . ." *United States v. Ward*, 299 U.S.123, 145-46 (1937).

This certainly does not represent a fair and impartial jury. Too may jurors knew of the case in this small community. The court, on its own motion, should have moved the case. In *Irvin v. Dowd*, 366 U.S. 717 (1961), the Supreme Court ruled that a jury which included eight person who had expressed opinions as to the defendant's guilt of the crime and which offense had received extensive newspaper, radio and television coverage did not meet the constitutional standard of impartiality:

> With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt form his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental process of the average man. . . . 366 U.S. at 727.

No less is required in this case and defendant is entitled to a new trial. *Sheppard v. Maxwell*, 384 U.S.333 (1966).

In this case petitioner was entitled to a new trial.

This issue was considered in *Quintero v. Bell*, 256 F.3d 409 (6th Cir. 2001). In *Quintero* habeas corpus relief was granted to a state prisoner where jurors who sat on the prisoner's trial had previously sat on the trial of a co-defendant several months earlier. The court ruled that this violated the defendant's right to have a trial with impartial and unbiased jurors as guaranteed by the Sixth Amendment. The same rational applies in this case. In addition, there were other infirmities with the trial jurors in this case.

Petitioner contended that he was denied a fair jury. There were no black venire persons. Petitioner, who was black, did not have a fair an impartial jury. (Tr.Supp.Tr.86).

Under the Sixth Amendment to the United States Constitution it is provided that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and a public trial, by an impartial jury of the State and District wherein the crime shall have been committed; . . ." A cognate provision of the Ohio Constitution, Section 10 of Article I likewise so provides.

In *Taylor v. Louisiana*, 419 U. S .522 (1975) a court ruled that jury venires must be reasonably representative of the community if this is not so a defendant is denied his right have a jury comprised of a fair cross-section of the community. This has been further refined in the case of *Duran v. Missouri*, 439 U.S.357 (1979).

Petitioner was entitled to have Juror White excused for cause. He was the brother of the Painesville Chief of Police. (Supp.Tr.10, 19-20). Painesville was the place where this happened and was prosecuting this case. Thus, Juror White should have been excused for cause. (Supp.Tr.87-88).

Rule 24(B)(10) of the Ohio Rules of Criminal Procedure provides a challenge for cause of a juror because ". . . he is related by consanguity or affinity within the fifth degree . . . to the person on whose complaint the prosecution was instituted. . . ." Painesville prosecuted this case. Being the Chief's brother would disqualify him. See Ohio Rev. Code §737.05.

II

Petitioner contends he was denied a fair trial when the court called a co-defendant, Richard D. Hayden as a court's witness. There was no basis for this and this unduly enhanced the credibility of Hayden.

Over objection, Richard T. Hayden was called as a court's witness. Richard Hayden was a principal offender who had been previously convicted. There is no basis for calling him as a court's witness. The prosecution had not even spoken to Richard Hayden. (Tr.68-70). Moreover, the prosecution had in its possession Richard Hayden's statements to the police along with his trial testimony. (Tr.71). There was no indication that Richard Hayden would not testify in accordance with his previous declarations or would recant, become hostile or refuse to testify. The calling of Richard T. Hayden as a court's witness not only violates the Ohio Rules of Evidence but deprived defendant of a fair trial and due process of law guaranteed by Section 10, Article I of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

Jamal Russell was also improperly questioned about his statements and answered a question by stating that his police statement so said as he testified to. (Tr.171).

Petitioner was prejudiced by this tactic. The prosecutor, by asking leading questions, referred to his statement and alluded to all-encompassing statements such as "everyone" wanting to fight and get revenge. (Tr.87). This was referred to as "everybody" and "all". (Tr.88). The prosecutor then related to Hayden his statements to the police about hitting Gipson. (Tr.101-02). Petitioner was just lumped together as "the three of you." (Tr.111).

This tactic was repeated when the prosecutor told Hayden what he purportedly told the police. He simply made references to the "three of you." (Tr. 143-44, 4x), or "all of you"

Evid R.607 also states that a party calling a witness may attack the witness' credibility through use of a prior inconsistent statement only upon a showing of surprise and affirmative damage. This rule was established to negate the strategy of a party calling a known adverse witness simply to

get a prior inconsistent statement into evidence by way of impeachment and "thus doing indirectly what he could not have done directly." This is exactly what the state did in this case. The state should not have been permitted to do under one rule of evidence what another rule of evidence expressly prohibits. Fundamental fairness dictates that the state play by the rules. Here, the state used the court as a straw man to get inadmissible evidence that in front of the jury to bolster its case. It is within the discretion of the trial court to call a witness as the court's witness in the interest of justice and the ascertainment of the truth. However, the court's role is not to be a tool of the prosecutor to reveal the state's version of the truth. *United States v. Wilson*, 447 F.2d 1, 8-9 (9th Cir.1971).

III

Petitioner contends he was denied a fair trial when the court permitted questioning of petitioner when he testified in own defense and later commented on the fact that petitioner did not come forward voluntarily to make a statement to the police. Petitioner's right to a fair trial was further compromised and compounded when the court permitted evidence to be offered concerning alleged efforts made by the police to contact petitioner for a statement.

Petitioner testified in his own behalf. On cross-examination by the prosecutor the petitioner's right not to make a statement and remain silent was infringed. Thus, petitioner was questioned as to whether he went to the police to make a statement. (Tr.321-22). Moreover, the prosecutor asked petitioner: "you never went and told the police about anything that happened, did you?" (Tr.43 5).

Moreover, in closing argument the prosecutor again alluded to the fact that petitioner did not go to the police and make a statement. (Tr.486). Objections were overruled by the court.

This was wholly unfair and deprived petitioner of a fair trial. In *Minor v. Black*, 527 F.2d 1 (6th Cir.1975), the defendant in a state criminal prosecution testified in his own behalf. In cross-examination defendant was questioned, without objection, about his failure to tell the police about his alibi. This failure was also alluded to in final argument by the prosecutor. The court ruled that even in absence of an objection this deprived defendant of a fair trial. See *United States v. Tenorio*, 69 F.3d 1103 (11th Cir.1995).

In *State v. Sabbah*, 13 Ohio App.3d 124, 468 N.E.2d 718 (1982), the defendant was convicted of murder. During trial he was questioned by the prosecutor as to why he had not stated at any point prior to his trial testimony that he had acted in self-defense. The Court of Appeals for Sandusky County ruled that this was prejudicially erroneous.

In *Doyle v. Ohio*, 426 U.S. 610 (1976), the Supreme Court ruled that use of a defendant's failure to make a statement after having been advised of his rights it would be constitutional error. This was the same error committed in this case. Petitioner had no need to make a statement. If petitioner was brought into custody and would have to have been advised of his rights and could have declined to make a statement.

Extensive testimony was offered concerning efforts to contact petitioner. This evidence was allowed over defense objection. This in effect, deprived petitioner of a fair trial. Petitioner, even if contacted by the police would have to be advised of his constitutional right not to make a statement. *Miranda v. Arizona*, 384 U.S.436 (1966). This type of evidence cannot be used against petitioner. Thus, allowing the prosecutor to offer evidence concerning attempts to contact petitioner deprived him of a fair trial.

Det. Robert Sayer testified that as a result of his interview with Damon Anderson that he learned other names. He was asked what he did (Tr.319). Sayer testified that he contacted

these other parties. He was given and was then asked who he contacted. (Tr.319). Sayer testified that he contacted Richard Hayden and Jamal Russell. There were attempts made to contact petitioner (Tr.320). Thereafter, Sayer related his efforts concerning his efforts to contact petitioner.

Sayer claimed he spoke with a person who identified himself as Keith Bowles. This unknown person told Sayer that he would be in. (Tr.322). Thereafter, Sayer related that he went to Cleveland, stopped at Bowles' home but could not locate him to serve the warrant. Later, after an indictment, a second warrant was issued on September 4, 1998. (Tr.324, 326).

Thereafter, Sayer testified that the FBI became involved because of a fugitive from justice warrant for petitioner. (Tr.329). This evidence was totally irrelevant, prejudicial and denied petitioner a fair trial.

"It is improper 'under the guise of "artful cross-examination" to tell the jury the substance of inadmissible evidence." *United States v. Sanchez*, 176 F.3d 1214, 1222 (9th Cir.1999).

More recently, one court found that this type of questioning to constitute prosecutorial misconduct. It was ineffective assistance of counsel for not objecting to this type of questioning. *Washington v. Houfbauer*, 228 F.3d 689 (6th Cir.2000)

In *Berger v. United States*, 295 U.S. 78 (1935), it was alleged that the prosecuting attorney overstepped the bounds of propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense. The record showed that the prosecuting attorney was guilty of misstating the facts in his cross-examination of witnesses, putting into the mouths of such witnesses things that they had not said; suggesting by his questions that the statements has been made to him personally out of court and pretending to understand that a witness said something which

he had not said and persistently cross-examining witnesses upon the basis, assuming prejudicial facts not in evidence, by bullying and arguing with witnesses, and thoroughly conducting himself in an indecorous and improper manner. The court held that this type of conduct deprived one of a fair trial. Even in instances where the trial court did sustain some objections, this would not be enough. 295 U.S. at 85.

IV

Petitioner contends he was denied a fair trial when the prosecutor was permitted to elicit from a co-defendant that he had been convicted of the offense of murder and the court did not give any limiting instruction to the jury.

The state improperly called Richard T. Hayden and convinced the court to call him as a court's witness. By this ruse the prosecutor was able to place before the jury that Richard T. Hayden had been convicted of Gipson's murder. (Tr 151-52). This left the jury with the obvious inference that since Hayden was convicted of murder petitioner was prosecuted as an aider and abettor to Hayden that petitioner was guilty. No cautionary instruction was given by the court. The courts have ruled that if there is a guilty plea or a conviction of one associated with the same offense on trial that the jury must be instructed not to consider that plea. The court overruled petitioner's objections to this line of inquiry and permitted the witness to answer. (Tr. 151-52). Thus, the jury heard the principal being guilty and petitioner, being an aider and abettor to the principal Richard Hayden that he was guilty in this regard. Although Hayden did not plea guilty he was found guilty and the same rules as to a guilty plea is applicable here. "Evidence of . . . guilty pleas is a amenable misuse. Without instruction, it is possible the jury could use the pleas as evidence of . . . guilt. This danger may be averted only by adequate cautionary instructions. . . ." *United States v. Rivera-Santiago*, 872 F.2d 1073, 1084 (1989). Such a limitation would have been appropriate ". . . because ad-

mission of a co-defendant's guilty plea can be extremely prejudicial to the defendant given the natural human tendency to assume that if an aider and abettor is guilty, the principal must also be guilty." *Government of Virgin Islands v. Mujahid*, 990 F.2d 111, 116 (3d Cir.1993). See *United States v. Prawl*, 168 F.3d 622 (2d Cir.1999).

V

Petitioner contends he was denied due process of law and his right to present a defense when the court would not instruct the jury on any lesser included offense including the offense of assault. Petitioner testified to his version of the offense and, at most, committed an assault. Petitioner was clearly entitled to such an instruction.

Petitioner requested that the jury be instructed on assault. The evidence presented by petitioner was that petitioner only hit Ollie Gibson and was in no way responsible for the fatal blows to Ollie Gibson. Ollie Gibson died from wounds that he received from the stomping to his head by Richard T. Hayden. (Tr. 244). None of these injuries inflicted by petitioner were fatal or contributed to death.

The prosecutor conceded that petitioner did not kick Gipson in the head. ("it's not represented to any of you that Keith Bowles kicked him in the head. . . ." Tr.514).

In these circumstances petitioner was entitled to an instruction on the lesser included offense of assault. The denial of petitioner's request was improper and prejudicial. (Tr.466-67).

Petitioner's entitlement to an instruction on assault was decided in *State v. Cochrane*, 151 Ohio St. 128, 84 N.E.2d 742 (1949). In *Cochrane* the defendant was indicted for murder in the first degree. The victim died as a result of being hit in the jaw. This caused the decedent to fall against a chair occupied by another patron. After the defendant left the scene

the decedent died. At trial the case was submitted to the jury on the charge of first degree murder, second degree murder and manslaughter. The defendant was convicted of second degree murder and sentenced accordingly. On further appeal to the Ohio Supreme Court, the court ruled that the defendant was entitled to an instruction on the lesser offense of assault and battery:

> If in the trial on an indictment for murder it is possible under the evidence to acquit the defendant of murder in the first degree, of murder in the second degree, and of manslaughter because the evidence fails to establish beyond a reasonable doubt a casual connection between the criminal agency and the cause of death or because the evidence fails to establish any other essential element of such offenses, it is competent for the jury where the evidence warrant it, to find the defendant guilty of assault and battery only and under such circumstances it is error to the prejudice of the defendant to refuse a request to charged on the lesser offense of assault and battery.

In this case petitioner was entitled to such an instruction. There was ample evidence that petitioner was only guilty of an assault and not of murder. Where the record presents evidence concerning the existence of a lesser offense this the court is duty bound to so instruct the jury.

In *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St. 3d 585, 591, 575 N.E. 828, 831 (1991), the following was stated:

> It is well established that the trial court will not instruct the jury where there is no evidence to support an issue. *Riley v. Cincinnati* (1976), 46 Ohio St. 2d 287, 75 O.O. 2d 331, 348 N.E. 2d 135. However, the corollary of this maxim is also true. "Ordinarily requested instructions should be given if they are correct statements of the law applicable to the fact in the case and reasonable

minds might reach the conclusion sought by the instruction." Markus & Palmer, Trial Handbook for Ohio Lawyers (3 Ed. 1991) 860, Section 36:2. See, also *Feterle v. Huettner* (1971), 28 Ohio St. 2d 54, 57 O.O. 2d 213, 275 N.E. 2d 340, at the syllabus: "In reviewing a record to ascertain the presence of sufficient evidence to support the giving of a[n]* * * instruction, an appellate court should determine whether the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction."

An instruction on lesser included offenses is required if the jury could reasonably find against the state on any element of the greater offense. This rule was set forth as follows:

> If the evidence adduced on behalf of the defense is such that if accepted by the trier of fact it would constitute a complete defense to all substantive elements of the crime charged, the trier of fact will not be permitted to consider a lesser included offense unless the trier of fact could reasonably find against the state and for the accused upon one or more of the elements of the crime charged, and for the state and against the accused on the remaining elements, which, by themselves, would sustain a conviction upon a lesser included offense.
>
> The persuasiveness of the evidence regarding the lesser included offense is irrelevant. If under any reasonable view of the evidence it is possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense, the instruction on the lesser included offense must be given. The evidence must be considered in the light most favorable to the defendant. *State v. Wilkins*, 64 Ohio St. 2d 283, 388, 415 N.E. 2d 303, 308 (1980). Accord, *State v. Davis*, 6 Ohio St. 3d 91, 95, 451 N.E. 2d 776 (1983); *State v. Solomon*, 66 Ohio St. 2d 214, 421 N.E. 2d 139 (1981).

The Due Process Clause of the Fourteenth Amendment requires that lesser included offense: be submitted to the jury. This was noted by the Supreme Court in *Hooper v. Evans*, 456 U.S. 605 (1982).

> *Beck v. Alabama*, 447 U.S. 625 (1980), held that the due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction. The jury's discretion is thus channeled so that it may convict a defendant of any crime fairly supported by the evidence. Under Alabama law, the rule in non-capital cases is that a lesser included offense instruction should be given if "there is any reasonable theory from the evidence which would support the position." *Fulghum v. State*, 291 Ala.71, 74, 277 So.2d 886, 890 (1973). The federal rule is that a lesser included offense instruction should be given "if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater." *Keeble v. United States*, 413 U.S. 205, 208, 93 S.Ct. 1193, 1995, 36 L.Ed2d 844 (1973). The Alabama rule clearly does not offend federal constitutional standards, and no reason has been advanced why it should not apply in capital cases. 456 U.S. at 611-12.

Moreover, other courts have held that it is required that an instruction upon a lesser included offense be given. *Brewer v. Overberg*, 524 F.2d 51 (6th Cir. 1980).

It is "beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of a lesser offense and acquit him of the greater." *Keeble v. United States*, 412 U.S. 205, 208 (1973). See *Sansone v. United States*, 380 U.S. 343, 349 (1965).

VI

Petitioner contends he was denied due process of law when the court improperly informed the jury concerning a presumption given to the state in proving petitioner was an alleged aider and abettor.

In instructing the jury on aiding and abetting the jury was told that:

> Thus, participation in criminal intent may be inferred from the presence, companionship and conduct before and after the offense is committed. (Tr.536). This was improper and unconstitutional.

First, direct evidence was offered on this proposition. The Supreme Court has ruled that a jury should not be instructed on a presumption when evidence is offered on the subject. In *Forbes v. Midwest Air Charter Inc.*, 86 Ohio St.3d 83, 711 N.E.2d 997 (1999), the court informed the jury about a statutory presumption even though evidence had been offered. The court reversed because ". . . the jury in this case should not have been instructed as to the . . . presumption . . . because 'evidence tending to prove a fact . . . , which for procedural purposes would be presumed in the absence of such evidence,' was presented. . . ." 86 Ohio St.3d at 86-87, 711 N.E.2d at 999.

Second, this is unconstitutional because it is arbitrary and unreasonable. There is no rational connection between the fact proven and the fact presumed. Under the instruction the jury could conclude that defendant was guilty as an aider and abetter merely from his presence, companionship and conduct before or after the offense is committed. This is an unconstitutional presumption. *United States v. Gainey*, 380 U.S. 63 (1965); *Tot v. United States*, 319 U.S. 463, 467 (1943); *State v. Swanson*, 52 Ohio App.3d 78, 557 N.E.2d 848 (1989).

Third, this was an improper statement of the law. Even if the evidence of the prosecution is believed, "the mere

presence of an accused at or near the scene of the crime does not conclusively establish that the accused committed the crime. . . ." *State v. Weber*, 124 Ohio App. 3d 451, 463, 706 N.E.2d 427, 435 (1997). This is instruction is misleading because it goes to aiding and abetting. This evidence occurs "after the event." Evidence of aiding and abetting must precede the occurrence. Thus:

> Conviction as an aider and abettor in the commission of a crime requires proof beyond a reasonable doubt that the accused advised, hired, incited, commanded, counseled, or otherwise participated as a co-conspirator, or had some connection with the transaction preceding its occurrence other than merely seeking the crime being committed. *State v. Starr*, 24 Ohio App.2d 56, 263 N.E.2d 572 (1970).

Further, in *State v. Sims*, 10 Ohio App. 3d 56, 64, 460 N.E. 2d 672, 676 (1983), the court stated that:

> A frequently quoted definition of "aiding and abetting" is contained in *Smith v. State* (1931), 41 Ohio App. 64, 67-68. 179 N.E. 696:
>
> "In the absence of a conspiracy or some preceding connection with the transaction, one does not aid and abet if he merely sees a crime being committed" *Goins v. State*, 46 Ohio St. 457, 21 N.E. 476.

Thus, this is a misstatement of the law because the fact that petitioner may have been with Hayden afterwards was allowed to be used by the jury to conclude that petitioner aided and abetted Hayden.

Fourth, such a presumption which foregoes the necessity of proof is unconstitutional, especially where it relieves the state of proving all elements of the offense with evidence beyond a reasonable doubt. *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

Fifth, there is no statutory basis for giving such an instruction whether the presumption be deemed permissive or mandatory. This presumption is no where spelled out in the Ohio Criminal Code.

In Ohio the legislature is the only body that has authority to define crimes. Since this is not set forth in any statute, the court may not usurp a legislative function and instruct the jury with reference to such a presumption. *State ex rel Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.2d 451, 455-56, 715 N.E.2d 1062, 1071 (1999).

Thus, a court has no authority to give a jury instruction concerning a presumption which arises from a judicial decision. If any presumption exists in these circumstances it has to be the result of an act of the legislature and not the court. Even a presumption under Rule 301 of the Ohio Rules of Evidence it refers only to civil actions and presumptions provided for by the General Assembly.

VII

Petitioner contends he was denied a fair trial when the court, in its jury instructions, stated that Richard Hayden was an accomplice. This was a question of fact for the jury and the trial judge usurped a jury function by stating, as a matter of law, that Richard Hayden was an accomplice.

The court instructed that "Now we had an accomplice testify in this case." (Tr. 537). This was objected to by petitioner. (Tr.557-558). This was an unconstitutional comment on the evidence. Whether Richard T. Hayden was or was not an accomplice is a fact question. By designating Richard T. Hayden as "accomplice" the court in effect informed that jury that Hayden was an accomplice of defendant. There is no other way in which this statement could be taken. This denied petitioner a fair trial and invaded the province of the jury.

A fundamental constitutional right is violated because:

> The Constitution gives a criminal defendant the right to have the jury determined, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. . . . *United States v. Gaudin*, 515 U.S.506, 522-23 (1995).
>
> A defendant charged with a serious crime has the right to have the jury determine his guilt or innocence, . . . and a jury's verdict cannot stand if the instructions provided the jury do not require it to find each and every element of the crime under the proper standard of proof. . . . Findings made by a judge cannot cure deficiencies in the jury's findings as to the guilt or innocence of a defendant resulting from a failure to instruct it to find an element of the crime. . . . *Cabana v. Bullock*, 474 U.S.376, 384-85 (1986).

VIII

Petitioner contends he was denied due process of law and a fair trial when the court would not instruct that the state had prove a culpable mental state in order to convict petitioner. Petitioner, who was convicted of the offense of murder and sentenced to a term of imprisonment of fifteen (15) years to life certainly had the right to require the state to prove a culpable mental state in order to convict petitioner.

Petitioner requested that the jury be instructed that causing the death of another must be done knowingly, (Tr.441). The court refused to give such an instruction.

The Ohio Supreme Court has ruled that "guilty knowledge is an essential ingredient of crime. . . ." *State v. Cameron*, 97 Ohio St. 50, 60, 109 N.E.584, 589 (1914).

Thus, criminal liability must be based on more than what is required for liability for negligence in a civil action. The instruction given by the court did not require such proof.

Where criminal liability, and especially felony liability is involved, the state must comport with constitutional guidelines. Thus, actual knowledge is required. Otherwise, the statute would be unconstitutional. *United States v. Wolff*, 785 F.2d 1121 (6th Cir.1985).

Further, the instructions were improper and denied petitioner a fair trial when the court ruled that the court's instruction on flight was harmless error. The Court of Appeals undertook an improper analysis of the harmless error rule where constitutional error was involved. The Court of Appeals did not properly apply the constitutional harmless error analysis.

Constitutional error can be said to be harmless only if "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). Second, in *Chapman*, the court ruled that "constitutional error . . . casts on someone other than the person prejudiced by it a burden to show that it was harmless." 386 U.S. at 24.

This instruction certainly cannot be deemed harmless. The prosecutor argued

> Now ladies and gentlemen, you will also hear the judge instruct you on flight, what constitutes flight. You heard the evidence, this thing rook place on August 23rd, Mr. Bowles knew darn well that something bad happened to these guys. He knew there was a death, he knew there were two deaths. Two of his lifelong buddies went in and talked to the police and gave statements, they all me back at the Keyhole that night, they knew what happened, Mr. Bowles doesn't turn himself in—
>
> MR MANCINO: Objection.
> THE COURT: Overruled. (Tr.483 -84).

Further this was compounded when the prosecutor stated that petitioner was guilty. (Tr.486). This has been held to be

improper argument. *United States v. Fullerton*, 187 F.3d 587, 592 (6th Cir.1999).

The court instructed the jury on flight:

> In this case there has been evidence presented that the defendant, Keith Bowles, fled from the Argonne Arms, the vicinity of the alleged crime, and then remained at large. In regarding this evidence you are instructed that flight in and of itself does not raise a presumption of guilt but it may tend to show consciousness of guilt or a guilty conscience with the crime.
>
> If, therefore, you find that the defendant did flee from the Argonne Arms, the vicinity of the alleged crime, and then remained at large, you may consider these circumstances in the case in determining the guilt or innocence of the defendant. (Tr.536-37).

A flight instruction was inappropriate because petitioner had no other means to get from Painesville to Cleveland, (Tr. 120). Jamal Russell drove the car with petitioner in the rear seat. (Tr.136). The police even waived them on to leave the area. (Tr.137). Afterwards Jamal Russell switched seats with Hayden driving. (Tr.138). The officer told all to leave and defendant was driven back to Cleveland. (Tr.174).

IX

Petitioner contends he was denied a fair trial by reason of improper prosecutorial argument. The singular, if not cumulative effect of these arguments was deprive petitioner a fair trial.

A number of improper statements were made by the prosecutor concerning this case including statements as to what constitutes evidence. *Kincaid v. Sparkman*, 175 F.3d 444 (6th Cir. 1999).

1. The prosecutor made much of the fact that petitioner did not come in and talk to the police. As stated previously

even if defendant did turn himself in he certainly did not have to make a statement.

The prosecutor argued that "Why do you think the other people came in, hey, I just kicked the dude, I didn't shoot no one?" (Tr.479).

Even though an objection was sustained the prosecutor went on to argue that this showed a consciousness of guilt.

> Now ladies and gentlemen, you will also hear the judge instruct you on flight, what constitutes flight. You heard the evidence, this thing took place on August 23rd, Mr. Bowles knew darn well that something bad happened to these guys. He knew there was a death, he knew there were two deaths. Two of his lifelong buddies went in and talked to the police and gave statements, they all me back at the Keyhole that night, they knew what happened, Mr. Bowles doesn't turn himself in—
>
> MR. MANCINO: Objection.
> THE COURT: Overruled. (Tr.483-84).

Later, the following argument was made:

> Within the week Mr. Russell came in and talked, Mr. Anderson came in and talked, Mr. Hayden came in and talked, Mr. Bowles didn't come in. Mr. Bowles went out and he had breakfast that morning not far from Metro-Health Center according to his testimony, Ollie Gipson died at 9:25 a.m., on the 23rdof August—
>
> MR MANCINO: Objection.
> MR. HACKMAN: —in the City of Cleveland—
> THE COURT: Overruled. (Tr.486)

These arguments equate flight with exercising a constitutional right against self-incrimination. This was improper argument. *Minor v. Black*, 527 F.2d 1 (6th Cir.1975). Petitioner was denied a fair trial. *Martin v. Parker*, 11 F.3d 613

(6th Cir.1994); *Sizemore v. Fletcher*, 921 F.2d 667 (6th Cir.1990).

2. The prosecutor improperly stated that petitioner was guilty:

> Ladies and gentlemen, Mr. Bowles is guilty. (Tr.486).

As stated in *State v. Cloud*, 112 Ohio App.208, 215, 168 N.E.2d 761, 766 (1960), "The ruled of law in Ohio is well settled that a prosecutor commits reversible error in stating in argument to a jury that in his personal opinion a defendant in a criminal case is guilty of the crime charged." *State v. Thayer*, 124 Ohio St.1, 176 N.E.656 (1931) at syllabus.

Improper statements concerning the evidence, even if unobjected to, are reversible error. *State v. LaFreniere*, 85 Ohio App.3d 840, 853-54, 621 N.E.2d 812, 821-22 (1993).

3. The prosecutor further improperly argued as to what the law was and what had to be proven in the case. First the prosecutor stated that the case had nothing to do with petitioner intending to kill anyone. (Tr.474). Then prosecutor improperly stated constitutes aiding and abetting "You will hear the Judge instruct you that one who aids and abets another is just as guilty . . . as the principal offender. You will be instructed that active participation, however slight, is aiding and abetting another person. (Tr.475).

This is an improper statement of aiding and abetting, which oversimplifies and misstates the law.

Thereafter, the prosecutor stated that they did not have to prove that the three of them specifically intended to cause serious physical harm. (Tr.505-06).

4. The prosecutor maligned defense counsel. The prosecutor attempted to give his opinion as to what statements of Richard Hayden were the truth.

Richard Hayden, what he's trying to tell you to listen to and told you Mr. Bowles kicked him one time. Now remember Mr. Hayden's testimony Mr. Hayden every time in his prior statement that he made, prior statement of his was all, all three of us were kicking, then Mr. Mancino put the words his mouth about one kick and he would agree to that.

MR. MANCINO: Objection.
THE COURT: Overruled. (Tr. 514)

Thereafter, the following was stated:

But Barbara Adeyemi, Mr. Mancino talks about her statement to the police and he's trying to say to you here that she never told the police and he's trying to say to you here that she never told the police the three of them were beating this man, that's not true.

MR. MANCINO: Objection.
MR. CULOTTA: That is not true—
TILE COURT: Overruled.
MR. CULOTTA:—and not what she said. In fact the statement he was reading to you it starts off one of the three beaters.
MR. MANCINO: Objection.
THE COURT: Overruled. (Tr.515)

This denigrates defense counsel and is improper. *State v. Keenan*, 66 Ohio St.3d 402, 406, 613 N.E.2d 203, 207 (1993). ("It is improper to denigrate defense counsel in the jury's presence for making objections. . . .").

X

Petitioner contends that he was denied due process of law and equal protection of the law when he convicted of an offense of murder which, in the Ohio statutory scheme was equivalent of involuntary manslaughter. Murder which carried a penalty of fifteen (15) years to life contained essentially

the same elements of involuntary manslaughter which carried a maximum sentence often (10) years. However, imposing the same elements resulted in petitioner being sentenced to fifteen (15) years to life thus violated his right of due process and equal protection of the law.

Petitioner was indicted on September 4, 1998 under the newly defined form of murder. The indictment alleged as follows:

> On or about the 23rd day of August, 1998, at the City of Painesville, Lake County, Ohio, one KEITH BOWLES aka "K.B.", did cause the death of Ollie T. Gipson as a proximate result of KEITH BOWLES aka "KB." committing or attempting to commit an offense of violence that is a felony of the first or second degree, to-wit: Felonious Assault, in violation of Section 2903.11 of the Revised Code.

This version of defining murder is contained in §2903.02(B)-(C) of the Ohio Revised Code:

> (B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of Section 2903.03 or 2903.04 of the Revised Code.
>
> (C) Division (B) of this section does not apply to an offense that becomes a felony of the first or second degree only if the offender previously has been convicted of that offense or another specified offense.

This statute is unconstitutional. It constitutes a denial of equal protection of law and is arbitrary, capricious and unreasonable.

In effect, the Ohio General Assembly has retained the traditional definition of murder which is to purposely cause

the death of another while also calling it murder which is the substantial equivalent of involuntary manslaughter.

This statue is unreasonable and arbitrary because to commit murder while in the commission of certain specified felonies does not even require a culpable mental state. Moreover, there must be no proof that the person purposely caused the death of another. Murder has always been, in Ohio history, an intentional act. Since murder carries a penalty of fifteen (15) years to life, involuntary manslaughter as either a felony of the first degree or third degree, only carries a maximum sentence of ten (10) years. Thus, by committing the very same act, different penalties are prescribed. The statute is unconstitutional because, in one form of murder the act be done "purposely", and the other eliminates of any culpable mental state. Disparate elements and penalties for the same act result.

It is hard to conceive that a murder could be committed without also committing some underlying felony. The new murder statute states that the act must be committed while committing or attempting to commit an offense of violence which is a felony of the first or second degree and which is not a violation of §2903.03 or §2903.04 of the Ohio Revised Code. This makes little sense. Without requiring a culpable mental state of purposely or a purpose to cause the death of another the new murder statute cannot pass constitutional muster.

Thus, what Ohio Revised Code §2903.02(B)-(C) does is to create two classifications of murder. However, there are less elements and an absence of a culpable mental state in murder under the newly enacted version contained in §2903.02(B) of the Ohio Revised Code. Given that there is no culpable mental state and no requirement that the act be done purposely and the same penalty result reeks of fundamental unfairness. It treats persons similarly situated completely

different and imposes a greater penalty for an act which would essentially constitute involuntary manslaughter.

The statute requires that there be an "offense of violence." That term is defined broadly in §2901.01(A)(9) of the Ohio Revised Code. There are approximately thirty-two (32) specific statutes in Ohio which could constitute offenses of violence. What is particularly revealing is that an offense of violence must be ". . . committed purposely or knowingly, and involving physical harm to persons or a risk of serious physical harm to persons; . . ." Thus, by definition an "offense of violence must be committed purposely or knowingly". Yet in this new version the death need not be caused either "purposely" and "knowingly" to constitute the offense of murder.

This is not just an example of poor legislative draftsmanship but evidences a statute that lacks required constitutional uniformity to satisfy the due process clause or the equal protection clauses of the Ohio and Federal Constitutions. It creates two classes of individuals who may be convicted of murder one whom must cause the death "purposely" and in the other one only must cause the death of another while committing or attempting to commit a specified offense of violence.

The Ohio Supreme Court has stated that the Fourteenth Amendment to the United States Constitution and Section 2, Article I of the Ohio Constitution require ". . . that all similarly situated individuals be treated in a similar manner. . . . In other words, laws are to operate equally upon persons who are identified in the same class." *State ex rel. Patterson v. Industrial Comm'n.*, 77 Ohio St.3d 201, 204, 672 N.E.2d 1008, 1011 (1996).

The Ohio Supreme Court has stated that a law, constitutional on its face, can be unconstitutional in its application:

> "[D]iscrimination against individuals or groups is sometimes an inevitable result of the operation of a statute." *Roseman v. Firemen & Policemen's Death Benefit Fund* (1993), 66 Ohio St.3d, 443, 446, 613 N.E.2d 574, 577. "The mere fact that a statute discriminates does not mean that the statute must unconstitutional." *Id.* at 446-447, 613 N.E.2d at 577.

In determining whether a statute violates equal protection, we examine the class distinction dawn to decide if a suspect class or fundamental right is involved in order to determine what level of scrutiny to apply. *Id.* at 447, 613 N.E.2d at 577. The right to sue a political subdivision has been held not be a fundamental right. *Fabrey, supra*, 70 Ohio St.3d at 353, 639 N.E.2d at 33. Moreover, this case does not involve a suspect class which has been traditionally defined as one involving race, national origin, religion, or sex. *Id.* Therefore, rather than apply heightened scrutiny, we review the statue accordingly to the "rational basis" test. Consequently, the statute must be upheld if it bears a rational relationship to a legitimate governmental interest. *Roseman, supra*, 66 Ohio St.3d at 447, 613 N.E.2d at 577. However, a statutory classification will be found to violate equal protection if it treats similarly situated people in a different manner based upon illogical and arbitrary basis. *Morris v. Savoy* (1991), 61 Ohio St.3d 684, 711, 576 N.E.2d 765, 785, citing *Stated v. Buckley* (1968), 16 Ohio St.2d 128, 45 0.0.2d 469, 243 N.E.2d 66 (A.W. Sweeney, J., concurring in part and dissenting in part). *Adamsky v. Buckeye Local School District*, 73 Ohio St.3d 360, 362, 653 N.E.2d 212, 214 (1995).

This statute smacks of fundamental unfairness and is unconstitutional in its application. In cases where the Supreme Court has ruled that statutes which apply differently to persons in similar circumstances are unconstitutional as denying

equal protection of the law. See *Caruso v. Aluminum Co. of America*, 15 Ohio St.3d 306, 473 N.E.2d 818 (1984); *State ex rel. Nytray v. Industrial Comm'n*, 2 Ohio St.3d 173, 443 N.E.2d 962 (1983).

XI

Petitioner contends he was denied due process of law when his conviction was allowed to stand as there was insufficient evidence to convict him of murder.

A.

Petitioner, who was prosecuted in a hybrid fashion as a principal offender and as an aider and abettor, was found guilty. The jury returned a specific finding that defendant was attempting to commit felonious assault.

Recently revised §2903.02(B) of the Ohio Revised Code created a new category of murder as follows:

> No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of Section 2903.03 or 2903.04 of the Revised Code.

Felonious assault is felony of the second degree unless it involves a peace officer. Ohio Rev. Code §2903.11. There is no claim that the deceased in this case was a peace officer.

Thus, the substantive offense of felonious assault would be a felony of the second degree. An attempt to commit felonious assault is a felony of the third degree. Section 2923.02(A) of the Ohio Revised Code provides that "An attempt to commit any other offense is an offense of the next lesser degree than the offense attempted. . . ."

Consequently, an attempt to commit felonious assault would be a felony of the third degree and does not qualify as the predicate felony for murder.

This is a criminal statute. As required by §2901.04(A) of the Ohio Revised Code, "Sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused."

However, since the underlying offense of felonious assault as applicable to this case was a felony of the second degree, an attempt to commit that felony results in a felony of the third degree. Thus, the murder statute is inapplicable.

Further, the imposition of a term of imprisonment of 15 years to life results in a cruel and unusual punishment under the circumstances of this case. Petitioner was in the vehicle when fatal blows were inflicted by Richard Hayden. Petitioner did not urge, incite, counsel or direct Richard Hayden. Richard Hayden testified that he did this on his own without any participation of any other person. The resulting penalty in this case certainly does not fit the offense and results in a cruel and unusual punishment. The prosecution enhanced an assault, a misdemeanor of the first degree, to the offense of murder. This is clearly unconstitutional.

B.

Richard Hayden testified that defendant just "skimmed" the back of Gipson's head. (Tr.98). Petitioner just "skimmed" Gipson (Tr.100). Afterwards, Damon Anderson (Long) punched Gipson twice in the face. (Tr. 100). Hayden then kicked him. At most, petitioner "probably kicked him once" which was "somewhere down around the legs or something." (Tr.101) Afterward "I kicked him maybe one or twice more." (Tr. 103).

Petitioner had no intention of beating anyone up. He was just a quiet person. (Tr.120-21). Gipson approached the car in a menacing manner when petitioner got out of the car. (Tr.123). Petitioner only "skimmed" Gipson which did no damage. (Tr.125)

After Gipson stumbled back Hayden "grabbed him, threw him down, tripped him down," (Tr.125). Petitioner had nothing to so with getting Gipson to the ground. (Tr.125).

Petitioner did not urge Hayden to do any damage. (Tr.125). Petitioner only kicked Gipson in the legs, (Tr.126), which did no damage. (Tr.127). Petitioner did not urge Anderson to kill Gipson. (Tr.127). Hayden was alone with Gipson and continued to kick him. (Tr.128). Hayden did throw Gipson to the ground. (Tr.129). Petitioner was in the car at this time, (Tr. 129-30), and said nothing to either Hayden or Anderson. (Tr.130). Hayden kicked Gipson straight on and Gipson did not get up. (Tr.131). Hayden said he did not intend to cause the death of Gipson. (Tr.140).

The whole purpose of going to Argonne Arms was to get "Stickman" (Antonio Rymmer) and "kick his ass". (Tr.163-64). Gipson approached the car with his hand in his shirt. (Tr.166, 192).

It was thought that Gipson had a gun. (Tr.167). Petitioner only kicked Gipson. After petitioner got in the car Hayden "stomped on the guy's head three times. . . ." (Tr.168). No one had a gun or weapon. There was no prior plan to beat someone up. (Tr.186)

Russell did not know how Gipson wound up on the ground. (Tr.194). Petitioner only punch Gipson in the case. (Tr.195). Gipson was only kicked in the stomach by petitioner according to Russell. (Tr.196). Petitioner got back into the car when Hayden did this stomping entirely on his own, (Tr. 197), while petitioner is seated in the back seat of the car. (Tr. 198).

Further in this case there is insufficient evidence to prove defendant aided and abetted Richard Hayden. Richard Hayden testified that he inflicted the fatal blows on his own. Petitioner did not in any way participate in that fatal confrontation. It cannot be said as a matter of law that defendant was an aider and abettor in these circumstances.

The appropriate standard to determine whether one may be convicted as an aider and abettor was set forth in the syllabus in *State v. Starr*, 24 Ohio App. 2d 56, 263 N.E. 2d 572 (1970):

> Conviction as an aider and abettor in the commission of a crime requires proof beyond a reasonable doubt that the accused advised, hired, incited, commanded, counseled, or otherwise participated as a co-conspirator, or had some connection with the transaction preceding its occurrence other than merely seeking the crime being committed.

It is apparent from the foregoing that there was insufficient evidence to convict the petitioner of aiding and abetting. It should be noted that under the complicity statute, §2923.03 of the Ohio Revised Code there are four forms of complicity. One of those is soliciting or procuring another to commit the offense. There is no evidence in this record and the petitioner was not charged with soliciting or procuring. It specifically charged with aiding and abetting another in the commission of the offense. Consequently, the conviction in this case violates elementary precepts of due process of law. There was clearly insufficient evidence to permit a rational factfinder to return a verdict of guilty.

A review of the record in this case shows that petitioner's constitutional rights were violated in these proceedings. Petitioner is entitled to an award of writ of habeas corpus.

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SERVICE

A copy of the foregoing Traverse and Brief of Defendant-Appellant has been mailed to Bruce Horrigan, Assistant Attorney General, State Office Building, Corrections and Litigation Section, 11th Floor, 615 West Superior Avenue, Cleveland, Ohio 44113-1899, on this 2nd day of December, 2002.

/s/ Paul Mancino
PAUL MANCINO, JR. (0015576)
Attorney for Petitioner

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:02 CV 1520
Judge Donald C. Nugent
Magistrate Judge Jack B. Streepy

KEITH BOWLES,

Petitioner,

v.

HARRY RUSSELL,

Respondent.

REPORT AND RECOMMENDED DECISION OF MAGISTRATE JUDGE

STREEPY, MAG. J.

Keith Bowles (Bowles) has filed a petition for a writ of habeas corpus concerning his felony murder conviction in the Lake County, Ohio, Court of Common Pleas, on March 3, 1999, pursuant to a jury verdict. With a few exceptions, respondent does not contend there has been a procedural default nor does he contend the one year statute of limitations was not met.

On direct appeal, the Ohio Court of Appeals affirmed the conviction pursuant to a written decision. (Respondent's exhibit, RX, 15.) The court made the following findings of fact.

In the early morning of August 22, 1998, Bowles learned that his cousin and others had been jumped and beaten up by a group, one of whom was Antonio Rymmer. Bowles and

three others began looking for Rymmer to "beat him up in revenge for jumping their friends." (*Id.* at 2.) After driving for awhile, they "encountered Ollie Gipson [Gipson] whom they did not know. At that point, . . . [Bowles] and two of the others in the car got out of the car and started to beat Gipson by punching, kicking, and stomping on him. Gipson died as a result of the injuries he sustained in the attack." (*Id.* at 3.)

In his direct appeal, Bowles raised 13 assignments of error alleging a constitutional violation as to each. (RX 13) The state court assignments of error have been raised in this federal case, albeit reduced to 11 grounds.[1]

Review in this case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Under the AEDPA, a habeas corpus petition will not be issued concerning any claim which was determined on the merits by a state court decision unless the decision was contrary to, or involved unreasonable application of, clearly established federal law, as determined by the Supreme Court, 28 U.S.C. §2254(d)(1), or the decision of the state court was based on unreasonable determination of the facts in light of the evidence in the state court proceedings, 28 U.S.C. §2254(d)(2), *Lorraine v. Coyle*, 291 F.3d 416, 421-22 (6th Cir. 2002), *cert. denied*, 123 S.Ct. 1621 (2003). The decision of a state court is contrary to clearly established law if the court arrives at a conclusion opposite to that reached by the Supreme Court or if the state court decides the case differently than the Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). An unreasonable application occurs when the state court identified the correct principle but unreasonably applied that principle to the facts of the petitioner's case. *Id.*; *Lorraine*, 291 F.3d at 422. A state

[1] Assignments of error three and four have been combined into ground three of the petition, and assignments of error nine and ten have been combined into ground eight of the petition.

court decision is not unreasonable simply if the federal court disagrees with the decision; rather, the federal court must determine the state court decision is an objectively unreasonable application of federal law. *Williams*, 529 U.S. at 410-12. The factual findings by state courts are presumed to be correct. 28 U.S.C. §2254(e) (1); *Lorraine*, 291 F.3d at 422. For the reasons noted *infra*, as to those grounds for which Bowles cites Supreme Court precedent, the state court decision was no' contrary to, or an unreasonable application of, said precedent.

Bowles has the burden of showing that the state's decision is contrary to, or an unreasonable application of, Supreme Court precedent. *Williams v. Matesanz*, 230 F.3d 421, 424-25 (1st Cir. 2000), *overruled on other grounds by Cambridge v. Hall*, 303 F.3d 24, 36-37 (1st Cir. 2002); *Warren v. Miller*, 78 F.Supp.2d 120, 133 (E.D.N.Y. 2000); *Alley v. Bell*, 101 F.Supp.2d 588, 658 (W.D. Tenn. 2000); *Ward v. French*, 989 F.Supp. 752, 763 (E.D.N.C. 1997), *aff'd*, 165 F.3d 22 (4th Cir. 1998), *cert. denied*, 526 U.S. 1124 (1999). Bowles has not cited Supreme Court precedent in support of many of his grounds, thus has not met his burden.

I. Ground One

Ground one alleges denial of a fair and impartial jury because (1) no black jurors were summoned to serve as potential jurors, (2) the prospective jurors had recently been exposed to the trial of Bowles' co-defendant, and (3) one of the jurors should have been excused because he was the brother of the Painesville Chief of Police.[2]

Concerning the absence of black jurors, the appellate court found Bowles had "not demonstrated that representation of African-Americans jury venires is not fair and reasonable in relation to the number of such persons in Lake County.

---

[2] The murder occurred in Painesville, Ohio.

Furthermore, appellant has not presented any evidence from which we can infer that the number of African-Americans included in venires in Lake County is due to systematic exclusion of this racial group in the jury selection process." Thus, a violation of the Sixth Amendment right to have a jury comprised of a fair cross-section was not established. (RX 15 at 6.)

Bowles cites *Taylor v. Louisiana*, 419 U.S. 522 (1975), as refined in *Duren v. Missouri*, 439 U.S. 357 (1979), which held that "systematic exclusion" of women in the jury selection process resulting in jury pools which were not "reasonably representative of the community," denied a defendant his right to have a jury "selected from a fair cross-section of the community." *Duran* at 358-59. The only evidence relied upon by Bowles is that there was no black citizen in the jury venire for his trial. The appellate court determination that this failed to prove the alleged constitutional violation was not an unreasonable application of clearly established federal law.

Next, Bowles contends his case was tried shortly after a shooting "committed by Michael Love, almost simultaneously and at the same location," which "tainted the entire jury pool." The Ohio Court of Appeals found the voir dire of the jury selected for Bowles "reveals that none of the jurors at appellants trial indicated that they had formed an opinion as to appellant's guilt prior to the commencement of trial. We cannot conclude that appellant was denied a fair and impartial jury due to the jurors' exposure to pre-trial publicity." (RX 15 at 6.)

Bowles cites *United States v. Wood*, 299 U.S. 123, 145-46 (1937), and *Sheppard v. Maxwell*, 384 U.S. 333 (1966), which, at 351, requires that Bowles must either prove that pretrial publicity caused him to be prejudiced, or that adverse publicity was so significant that it created a probability of prejudice which inherently violated due process. Bowles has

not shown the appellate court's ruling was an unreasonable application of *Sheppard* and *Wood*.

With regard to excusing a juror for cause, Bowles relies only on Ohio law (brief at 3-4) which the appellate court held did not apply to the juror at issue. More to the point, Bowles has not alleged a constitutional violation nor cited a Supreme Court case, thus has not met his burden.

II. Ground Two

Bowles contends he was denied a fair trial when the trial court called one of his co-defendants, Richard Hayden (Hayden), to testify as a court witness. Calling Hayden as a court's witness allegedly violated due process of law.

Hayden was a co-defendant of Bowles who had been previously tried and convicted of the same murder that Bowles was on trial for. The prosecutor asked the judge to call Hayden to testify as a court's witness because counsel for Hayden had indicated he would not cooperate with the prosecutor.

The appellate court concluded there was reasonable justification for the trial court to believe that calling Hayden would benefit the jury in performing its fact finding responsibilities, thus there was no abuse of discretion. (RX 15 at 7-9.)

Bowles does not cite any Supreme Court precedent, thus has not met his burden. Moreover, rulings on evidentiary matters in state court do not constitute grounds for granting a writ of habeas corpus. Even an error in applying a state law regarding admissibility of evidence is usually not cognizable in federal habeas corpus. Only rulings that result in the denial of fundamental fairness will support such relief. *Walker v. Engle*, 703 F.2d 959, 962-63 (6th Cir.), *cert. denied*, 464 U.S. 962 (1983). The inquiry is not whether the state court ruling was correct as a matter of state law, but whether the ruling

denied petitioner a fundamentally fair trial. *Moore v. Tate*, 882 F.2d 1107, 1109 (6th Cir. 1989). Bowles has not shown the ruling denied him a fair trial.

Ground Three

Bowles alleges denial of a fair trial when (1) he was questioned on cross-examination about the fact he did not voluntarily make a statement to the police, and (2) when the court permitted evidence concerning efforts made by the police to contact him to make a statement.

The Ohio appellate court noted that the "prosecution did not attempt to impeach [Bowles] by claiming that he failed to make a statement to the police after he was arrested. Rather, the prosecution presented evidence that [Bowles] did not come forward to make a statement until nearly two months after the incident even though he was aware the police were looking for him. The evidence . . . was permissible because it was relevant to prove that appellant was attempting to evade the police." (RX 15 at 9-10)

Bowles cites *Doyle v. Ohio*, 426 U.S. 610, 611 (1976). *Doyle* held that a defendant who was arrested, given his *Miranda* rights, and did not make an exculpatory statement, but who testified at his trial, and gave exculpatory testimony, and was then cross examined at trial about his failure to have told the exculpatory story when he was arrested was denied his right to due process. The appellate court did not unreasonably apply, or rule contrary to, *Doyle*.

Ground Four

Ground four is the first of five grounds (grounds four through eight inclusive) that raise denial of a fair trial concerning the jury instructions. Ground four alleges the prosecutor was permitted to elicit from a testifying co-defendant (Hayden) that he had been convicted of murdering Gipson, but the court did not give any limiting instruction to the jury concerning that fact.

The Ohio appellate court noted the initial cross examination of Hayden by the prosecutor made no reference to any of Hayden's prior convictions. However, on cross examination by Bowles, Hayden was asked whether he had been convicted of any felony offenses during the past ten years. Hayden answered he had been convicted of a drug trafficking charge but failed to mention being convicted of murdering the victim for which Bowles was being tried. As a result, on recross examination of Hayden by the prosecution, he was asked about the murder conviction.

The court held that Bowles' cross examination had "opened the door" either to being impeached or under the "invited error" rule. Thus, Bowles could not take advantage of the prosecution recross. Accordingly, Bowles could not raise the issue on appeal. (RX 15 at 10-11.)

Bowles did not raise the issue of a failure to instruct on his direct appeal (RX 13 at ii, 12), thus the appellate court did not mention the lack of a cautionary instruction. However, Bowles has not cited any Supreme Court precedent in support of this ground (petitioner's brief at 8-9), thus has not met his burden.

Moreover, generally, errors in instructions of a trial court to a jury in a state criminal trial are not reviewable in federal habeas corpus proceedings. They are not constitutional errors unless they are so fundamentally unfair as to deprive petitioner of a fair trial and due process of law. Undesirable, erroneous, or even universally condemned instructions may survive due process scrutiny. *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *Long v. Smith*, 663 F.2d 18 (6th Cir. 1981), *cert. denied*, 455 U.S. 1024 (1982). In reviewing state court instructions on a claim of constitutional error, the challenged instructions should not be "judged in an artificial isolation but must be viewed in the context of the overall charge." *Boyde v. California*, 494 U.S. 370, 378 (1990) (quoting *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973)); *see also, Estelle v.*

McGuire, 502 U.S. 62, 72 (1991). An omission, or incomplete instruction, is less likely to violate due process than is a misstatement of law. *O'Guin v. Foltz*, 715 F.2d 397, 399 (6th Cir. 1983). The ultimate question to be decided is whether there is a "reasonable likelihood that the jurors . . . applied the instructions in a way that violated the Constitution." *Victor v. Nebraska*, 511 U.S. 1, 22 (1994); *see also, Estelle*, 502 U.S. at 72-73 n.4. The appellate court's decision was not an unreasonable application of Supreme Court precedent.

V. Ground Five

Bowles contends the court erred when it refused to instruct on a lesser included offense.

Bowles claimed on direct appeal that assault is a lesser included offense of murder, and while he admittedly kicked the victim, his kicking did not actually kill the victim. The appellate court noted Bowles was convicted of felony murder pursuant to Ohio Rev. Code. §2903.02(B) which only required the state prove the victim's death was a proximate result of Bowles' commission of an offense of violence that is a felony of the first or second degree. Bowles' underlying felony was felonious assault in that he "participated in the beating administered to the victim. He aided and abetted Richard Hayden, the principle offender." (RX 15 at 11.) When someone knowingly aids and abets, he is regarded as a principle and is just as guilty as if the person performed every act constituting the offense. Thus, "whether or not [Bowles] physically administered the actual blow that caused the victim's death is irrelevant." Since Bowles was tried as an accomplice, rather than a principle, "it would have been improper to instruct the jury on the lesser included offense of assault." (*Id.* at 12.)

Bowles cites *Hopper v. Evans*, 456 U.S. 605, 611-12 (1982), which held that due process requires a lesser included offense instruction "when the evidence warrants" it, but "only when

the evidence" warrants it. The court examines state law to determine if such an instruction is required. (*Id.* at 611.)

Since Ohio law did not require a lesser included offense instruction in Bowles' case, due process was not violated by the trial court's refusal to give the instruction. The appellate court did not unreasonably apply, or rule contrary to, *Hopper*.

VI. Ground Six

Ground six alleges the trial court unconstitutionally created a presumption in favor of the state on the issue of whether Bowles aided and abetted. Bowles argues the presumption was created by the following portion of the instructions (T. 536):

> Thus, participation in criminal intent may be inferred from the presence, companionship and conduct before and after the offense is committed.

The Ohio appellate court noted there were other portions of the instructions that were relevant, e.g., the trial court instructed that "mere presence is not enough to make [appellant] an accomplice." (RX 15 at 12.) Consideration of the entire jury instructions made it clear there was no error; indeed, previous Ohio decisions had upheld the same language used by the trial court in this case. (RX 15 at 12-13.)

The trial court's aiding and abetting instructions herein were comprehensive (T. 534-36), including that "in aiding, abetting, there must be active participation no matter how slight. Mere presence is not enough to make [Bowles] an accomplice, he must have done something more, he must have helped, assisted, incited, strengthened, encouraged another or otherwise participated as accomplice, however slight, in the criminal act in one of the ways I have previously mentioned." (*Id.* at 535-36.)

Bowles relies, *inter alia*, on *United States v. Gainey*, 380 U.S. 63 (1965), which considered the issue of whether a

statutory inference in a criminal case was constitutional. *Gainey* observed the court's instructions informed the jury that despite the statutory inference based on the defendant's presence at the scene of the crime, the instructions also stated the jury could still acquit. (*Id.* at 68.) Since no inference was created by the instruction, *Gainey* does not apply.

The argument of Bowles that one sentence taken out of context established a presumption is not well taken when considered as part of all the instructions. Bowles has not met his burden

VII. Ground Seven

Bowles contends a jury instruction unconstitutionally referred to Bowles as an "accomplice" of Hayden. The trial court instructed at one point, "[n]ow we had an accomplice testify in this case." (RX 15 at 13.) Bowles contends use of the word "accomplice" in the instructions "in effect informed that jury that Hayden was an accomplice of defendant." (Petitioner's brief at 15.)

The Ohio appellate court noted the following. The trial court was required to comment on accomplice testimony under Ohio Rev. Code §2923.03(D) which requires that when an accomplice testifies, a charge must substantially state the following:

> The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution.
>
> It is for you, as jurors, in the light of all the facts presented to you from the witness stand to evaluate such testimony and to determine its quality and worth or its lack of quality and worth.

The trial court essentially set forth the instruction, quoted above, as required by state law. (T. 537) The portion of the instruction objected to did not, in context, negate the statute. The court also held that if omission in the instructions of the word "alleged" before the word "accomplice" was error, it was harmless. (RX 15 at 13-14.)

As noted above, the court extensively instructed the jury on aiding and abetting. The jury was told, "if you find beyond a reasonable doubt that the defendant knowingly aided or abetted" Hayden or the other individual who participated in the beating "in committing or attempting to commit the offense of felonious assault and that Ollie Gipson died as a proximate result of the attempted commission or attempted commission, that is felonious assault, then you must find the defendant guilty." (T. 534-35) These instructions, and others, negated any suggestion that use of the word "accomplice" in one sentence eliminated the burden of proving the aiding and abetting element.

Bowles cites *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995), which in pertinent part stated a guilty verdict will not be permitted if the jury instructions did not require the jury to find each and every element of the crime under the proper standard of proof. *Gaudin* did not involve the issue of using the word "accomplice" in the context of aiding and abetting jury instructions.

Bowles also cites *Cabana v. Bullock*, 474 U.S. 376, 384-85 (1986). The same observation applies as noted in *Gaudin*. While *Cabana* dealt with a state felony murder statute, the issue was whether it is constitutional to impose the death sentence on to someone who commits felony murder. Capital punishment is not an issue in this case.

In summary, Bowles has failed to show that either *Gaudin* or *Cabana* applies to the issues in his trial and has not otherwise met his burden.

VIII. Ground Eight

Ground eight alleges: (1) the court refused to instruct that the state had to prove a culpable mental state in order to convict Bowles, and (2) the court improperly instructed on flight despite the fact it was not an issue.

Bowles requested an instruction that causing the death of another must be done knowingly (T. 441), but the court refused to give the instruction. The appellate court noted Bowles was being prosecuted for a felony-murder under Ohio Rev. Code §2903.02(B), which meant the state had the burden of proving Bowles caused "the death of another as a proximate result of the offenders committing or attempting to commit an offense of violence that is a felony of the first or second degree." (RX 15 at 14.) The state had to prove Bowles committed felonious assault which meant it had to prove Bowles "knowingly caused serious physical harm to another," citing Ohio Rev. Code §2903.11(A)(1), and the jury "was so instructed." In other words, the state was not required to prove that Bowles knowingly caused the death of the victim, only that he "knowingly caused serious physical harm to the victim which proximately resulted in the victim's death." (*Id.* at 15.)

Bowles has not cited a Supreme Court case, and the appellate court only analyzed the issue under state law. Thus, Bowles has not met his burden.

Regarding the instruction on flight, the appellate court noted that Bowles did not object to that charge, thus to reverse, it had to be found the trial court committed plain and substantial error. (RX 15 at 15.) The court found it was error to charge on flight, but the erroneous instruction was harmless beyond a reasonable doubt because of the overwhelming evidence of guilt. (*Id.* at 16.)

The fact Bowles did not object to this instruction, and this failure was noted by the appellate court, and applied by the

court, means that Bowles committed a procedural waiver. *Cooey v. Coyle*, 289 F.3d 882, 897-98, 901 (6th Cir. 2002), *cert. denied*, 123 S.Ct. 1620 (2003); *Hinkle v. Randle*, 271 F.3d 239, 244-45 (6th Cir. 2001). Bowles has not attempted to show cause and prejudice, thus the flight instruction issue is waived.

IX. Ground Nine

Bowles contends prosecutorial misconduct in the final argument. The Ohio appellate court considered Ohio law and found the comments Bowles complains of were not prejudicial. Specifically, the "strength of the evidence against appellant and the trivial nature of the prosecutor's comments militate against a conclusion that appellant was prejudiced by any of the prosecutor's arguments." (RX 15 at-17.)

Bowles has not cited a Supreme Court precedent, thus has not met his burden.

Generally, the scope of review is narrow as *Donnelly v. DeChristoforo*, 416 U.S. 637, 646-47 (1974), noted:

> Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions. Such arguments, like all closing arguments of counsel, are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Donnelly also noted, assuming there was prosecutorial misconduct, it must rise to a level that denies a defendant's right

to due process. Whether prosecutorial argument is so egregious as to render a trial fundamentally unfair must be determined by the totality of circumstances surrounding the individual case. *Summit v. Bordenkircher*, 608 F.2d 247 (6th Cir. 1979), *aff'd sub. nom., Watkins v. Sowders*, 449 U.S. 341 (1981). The issue of determining what prosecutorial error, assuming misconduct occurred, reaches egregious levels under *Donnelly* has been described as "not easy." *See Cook v. Bordenkircher*, 602 F.2d 117, 120 (6th Cir. 1979), *cert. denied*, 444 U.S. 936 (1979).

The appellate court appropriately applied *Donnelly* under the AEDPA.

X. Ground Ten

Bowles contends a denial of due process and equal protection because he was convicted of murder for committing a crime that was actually the equivalent of involuntary manslaughter, but he received a much longer sentence than if he had been convicted of involuntary manslaughter.

The Ohio Court of Appeals noted it had previously held that Ohio Rev. Code §2903.02(B) does not violate due process. That section does not eliminate the burden of proving *mens rea* because the intent to kill is conclusively presumed if the state proves the required intent to commit the underlying felony in the felony murder conviction. (RX 15 at 17-18.)

The court rejected the equal protection claim because no suspect class or fundamental right was involved. The legislation creating the felony murder rule bears a rational relationship to legitimate governmental interest. (*Id.* at 18-19.)

Bowles has not cited one Supreme Court precedent in support of his claims, choosing instead to cite Ohio law (traverse at 2024), thus has not met his burden.

Ground XI

Bowles contends there is insufficient evidence to convict him as an aider and abettor. On direct appeal, he contended "he merely kicked Ollie Gipson in the stomach and was in the car when Hayden administered the fatal blows to Gipson." (RX 15 at 20.) The appellate court reviewed the evidence (*id.* at 22):

> Richard Hayden testified that [Bowles] threw the first punch at Gipson, which caused him to flinch forward and then Damon Anderson punched him twice. Barbara Adeyemi testified that appellant and Anderson continuously beat Gipson by stepping on him and kicking him while Hayden was stomping on his head.

The appellate court found this was sufficient evidence to prove that Bowles aided and abetted Hayden "by participating in the beating of Gipson," thus denied the assignment of error. (*Id.*)

The constitutional standard for reviewing the sufficiency of the evidence was established in *Jackson v. Virginia*, 443 U.S. 307 (1979). Justice Stewart held that the "relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319. The standard is not whether the evidence is sufficient to convince the habeas court of the petitioner's guilt beyond a reasonable doubt. Nor does that standard require the prosecution to rule out every hypothesis except that of guilt beyond a reasonable doubt. *See Scott v. Perini*, 662 F.2d 428 (6th Cir. 1981), *cert. denied*, 456 U.S. 909 (1982).

The argument of Bowles is based upon portions of his own and Hayden's testimony, both of whom tended to minimize Bowles' participation. A rational jury could disbelieve the testimony cited by Bowles and instead credit the testimony

identified by the appellate court. The appellate court did not unreasonably apply *Jackson*.

RECOMMENDATION

It is recommended the petition be denied.

Dated: 23 May 2003 /s/ Jack B. Streepy
Jack B. Streepy
United States Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time WAIVES the right to appeal the District Court's order. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE No. 1:02CV1520

(JUDGE DONALD C. NUGENT)

KEITH BOWLES,

Petitioner,

vs.

HARRY RUSSELL, Warden,

Respondent.

OBJECTIONS AND EXCEPTIONS TO THE REPORT AND RECOMMENDED DECISION OF THE MAGISTRATE JUDGE

Now comes petitioner, Keith Bowles, and files these objections and exceptions to the report and recommended decision of the Magistrate Judge. Petitioner objects to each and every finding made by the Magistrate Judge and requests that this court conduct a *de novo* review of the entire record.

As a general proposition, the Magistrate Judge makes an improper analysis of these proceedings that were conducted in a state court. In the most part, the state court ignored the federal constitution issues and decided many of these matters under state law.

Consequently, this court is not bound by that determination. This was not an adjudication on the merits by a state court considering federal constitutional issues. In *Doan v. Brigano*, 237 F.3d 722 (6th Cir.2001); 28 U.S.C. §2254(d).

I

The Magistrate Judge, in considering defendant's claim concerning a jury panel that had been exposed to a trial of the co-defendant and fails to even acknowledge the decision in *Quintero v. Bell*, 256 F.3d 409 (6th Cir.2001). In *Quintero* habeas corpus relief was granted to a state prisoner where jurors who sat on the prisoner's trial had previously sat on the trial of a co-defendant several months earlier. The court ruled that this violated the defendant's right to have a trial with impartial and unbiased jurors as guaranteed by the Sixth Amendment. The same rational applies in this case. In addition, there were other infirmities with the trial jurors in this case.

This case was tried after another case involving a shooting committed by Michael Love almost simultaneously and at the same location (Supp.Tr.12, 50, 53-54, 56-57, 94-95). This tainted the entire jury pool. To be impartial jurors must posses a ". . . mental attitude of appropriate indifference, . . ." *United States v. Ward*, 299 U.S.123, 145-46 (1937).

This certainly does not represent a fair and impartial jury. Too may jurors knew of the case in this small community. The court, on its own motion, should have moved the case. In *Irvin v. Dowd*, 366 U.S.717 (1961), the Supreme Court ruled that a jury which included eight person who had expressed opinions as to the defendant's guilt of the crime and which offense had received extensive newspaper, radio and television coverage did not meet the constitutional standard of impartiality:

> With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt form his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental process of the average man. . . . 366 U.S. at 727.

No less is required in this case and defendant is entitled to a new trial. *Sheppard v. Maxwell*, 384 U.S .333 (1966).

There were no black venire persons. Petitioner, who was black, did not have a fair an impartial jury. (Tr. Supp.Tr.86).

Under the Sixth Amendment to the United States Constitution it is provided that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and a public trial, by an impartial jury of the State and District wherein the crime shall have been committed; . . ." A cognate provision of the Ohio Constitution, Section 10 of Article I likewise so provides.

In *Taylor v. Louisiana*, 419 U.S.522 (1975) a court ruled that jury venires must be reasonably representative of the community if this is not so a defendant is denied his right have a jury comprised of a fair cross-section of the community. This has been further refined in the case of *Duran v. Missouri*, 439 U.S.357 (1979).

Petitioner was entitled to have Juror White excused for cause. He was the brother of the Painesville Chief of Police. (Supp.Tr.10, 19-20). Painesville was the place where this happened and was prosecuting this case. Thus, Juror White should have been excused for cause. (Supp.Tr.87-88).

Rule 24(B)(10) of the Ohio Rules of Criminal Procedure provides a challenge for cause of a juror because ". . . he is related by consanguity or affinity within the fifth degree . . . to the person on whose complaint the prosecution was instituted. . . ." Painesville prosecuted this case. Being the Chief's brother would disqualify him. See Ohio Rev.Code §737.05.

II

The Magistrate Judge in considering the second claim as to the propriety of Richard Hayden being called as a court's witness fails to consider the constitutional implications. It is

not merely a question of state law. Petitioner was denied fundamental fairness by reason of the proceedings. By reason of the court calling Hayden as a court's witness, this gave enhanced credibility to this witness when the witness was not entitled to it. There was absolutely no basis for calling as witness.

Over objection, Richard T. Hayden was called as a court's witness. Richard Hayden was a principal offender who had been previously convicted. There is no basis for calling him as a court's witness. The prosecution had not even spoken to Richard Hayden. (Tr.68-70). Moreover, the prosecution had in its possession Richard Hayden's statements to the police along with his trial testimony. (Tr.71). There was no indication that Richard Hayden would not testify in accordance with his previous declarations or would recant, become hostile or refuse to testify. The calling of Richard T. Hayden as a court's witness not only violates the Ohio Rules of Evidence but deprived defendant of a fair trial and due process of law guaranteed by Section 10, Article I of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

Jamal Russell was also improperly questioned about his statements and answered a question by stating that his police statement so said as he testified to. (Tr.171).

Petitioner was prejudiced by this tactic. The prosecutor, by asking leading questions, referred to his statement and alluded to all-encompassing statements such as "everyone" wanting to fight and get revenge. (Tr.87). This was referred to as "everybody" and "all". (Tr.88). The prosecutor then related to Hayden his statements to the police about hitting Gipson. (Tr.101-02). Petitioner was just lumped together as "the three of you." (Tr.111).

This tactic was repeated when the prosecutor told Hayden what he purportedly told the police. He simply made references to the "three of you." (Tr. 143-44, 4x), or "all of you"

Evid R.607 also states that a party calling a witness may attack the witness' credibility through use of a prior inconsistent statement only upon a showing of surprise and affirmative damage. This rule was established to negate the strategy of a party calling a known adverse witness simply to get a prior inconsistent statement into evidence by way of impeachment and "thus doing indirectly what he could not have done directly." This is exactly what the state did in this case. The state should not have been permitted to do under one rule of evidence what another rule of evidence expressly prohibits. Fundamental fairness dictates that the state play by the rules. Here, the state used the court as a straw man to get inadmissible evidence that in front of the jury to bolster its case. It is within the discretion of the trial court to call a witness as the court's witness in the interest of justice and the ascertainment of the truth. However, the court's role is not to be a tool of the prosecutor to reveal the state's version of the truth. *United States v. Wilson*, 447 F.2d 1, 8-9 (9th Cir.1971)

III

The Magistrate Judge, in considering this claim again misses the point. The Magistrate Judge, without any analysis, adopts the reasoning by the Court of Appeals. The Magistrate Judge stated that the prosecution offered evidence that petitioner did not come forward to make a statement for nearly two (2) months after the incident even though he was aware the police were looking for him it was permissible because it is relevant to prove petitioner was attempting to evade the police. This was absolutely incorrect. Even if the police were looking for petitioner, petitioner was not required to make a statement. There was absolutely no relevance to anything in this case other than to bring before the jury that the prosecutor claimed that petitioner was obligated to make a statement and since he did not make a statement that was evidence of his guilt. The analysis by the court was flawed. The Magistrate Judge did not even consider what occurred at the trial

and the context in which it occurred at the trial. The prosecutor improperly questioned petitioner when he testified. Later the prosecutor commented on the fact that petitioner did not come forward and voluntarily to make a statement to the police.

Petitioner testified in his own behalf. On cross-examination by the prosecutor the petitioner's right not to make a statement and remain silent was infringed. Thus, petitioner was questioned as to whether he went to the police to make a statement. (Tr.321-22). Moreover, the prosecutor asked petitioner: "you never went and told the police about anything that happened, did you?" (Tr.43 5).

Moreover, in closing argument the prosecutor again alluded to the fact that petitioner did not go to the police and make a statement. (Tr.486). Objections were overruled by the court.

This was wholly unfair and deprived petitioner of a fair trial. In *Minor v. Black*, 527 F.2d 1 (6th Cir.1975), the defendant in a state criminal prosecution testified in his own behalf. In cross-examination defendant was questioned, without objection, about his failure to tell the police about his alibi. This failure was also alluded to in final argument by the prosecutor. The court ruled that even in absence of an objection this deprived defendant of a fair trial. See *United States v. Tenorio*, 69 F.3d 1103 (11th Cir.1995).

In *State v. Sabbah*, 13 Ohio App.3d 124, 468 N.E.2d 718 (1982), the defendant was convicted of murder. During trial he was questioned by the prosecutor as to why he had not stated at any point prior to his trial testimony that he had acted in self-defense. The Court of Appeals for Sandusky County ruled that this was prejudicially erroneous.

In *Doyle v. Ohio*, 426 U.S.610 (1976), the Supreme Court ruled that use of a defendant's failure to make a statement after having been advised of his rights it would be con-

stitutional error. This was the same error committed in this case. Petitioner had no need to make a statement. If petitioner was brought into custody and would have to have been advised of his rights and could have declined to make a statement.

Extensive testimony was offered concerning efforts to contact petitioner. This evidence was allowed over defense objection. This in effect, deprived petitioner of a fair trial. Petitioner, even if contacted by the police would have to be advised of his constitutional right not to make a statement. *Miranda v. Arizona*, 384 U.S.436 (1966). This type of evidence cannot be used against petitioner. Thus, allowing the prosecutor to offer evidence concerning attempts to contact petitioner deprived him of a fair trial.

Det. Robert Sayer testified that as a result of his interview with Damon Anderson that he learned other names. He was asked what he did (Tr.319). Sayer testified that he contacted these other parties. He was given and was then asked who he contacted. (Tr.319). Sayer testified that he contacted Richard Hayden and Jamal Russell. There were attempts made to contact petitioner (Tr.320). Thereafter, Sayer related his efforts concerning his efforts to contact petitioner.

Sayer claimed he spoke with a person who identified himself as Keith Bowles. This unknown person told Sayer that he would be in. (Tr.322). Thereafter, Sayer related that he went to Cleveland, stopped at Bowles' home but could not locate him to serve the warrant. Later, after an indictment, a second warrant was issued on September 4, 1998. (Tr.324, 326).

Thereafter, Sayer testified that the FBI became involved because of a fugitive from justice warrant for petitioner. (Tr.329). This evidence was totally irrelevant, prejudicial and denied petitioner a fair trial.

"It is improper 'under the guise of "artful cross-examination" to tell the jury the substance of inadmissible evidence." *United States v. Sanchez*, 176 F.3d 1214, 1222 (9th Cir.1999).

More recently, one court found that this type of questioning to constitute prosecutorial misconduct. It was ineffective assistance of counsel for not objecting to this type of questioning. *Washington v. Houfbauer*, 228 F.3d 689 (6th Cir. 2000)

In *Berger v. United States*, 295 U.S. 78 (1935), it was alleged that the prosecuting attorney overstepped the bounds of propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense. The record showed that the prosecuting attorney was guilty of misstating the facts in his cross-examination of witnesses, putting into the mouths of such witnesses things that they had not said; suggesting by his questions that the statements has been made to him personally out of court and pretending to understand that a witness said something which he had not said and persistently cross-examining witnesses upon the basis, assuming prejudicial facts not in evidence, by bullying and arguing with witnesses, and thoroughly conducting himself in an indecorous and improper manner. The court held that this type of conduct deprived one of a fair trial. Even in instances where the trial court did sustain some objections, this would not be enough. 295 U.S. at 85.

IV

The Magistrate Judge, in considering the claim that petitioner was denied a fair trial when the prosecutor was permitted to elicit from a testifying co-defendant, Richard Hayden, that he had been convicted of murdering Holly Gibson. The court failed to give any limiting instruction again misses the point.

Hayden was properly cross-examined as to whether he had been convicted of a felony in the last ten (10) years. Rule 609 of the Ohio Rules of Evidence specifically allows that inquiry. This was only elicited to test the credibility of a witness and not for any substantive purpose. Hayden answered that he had a drug trafficking charge. This was sufficient. The prosecutor had no need to go into the fact that he had been convicted in connection with the death of Ollie Gipson.

The state improperly called Richard T. Hayden and convinced the court to call him as a court's witness. By this ruse the prosecutor was able to place before the jury that Richard T. Hayden had been convicted of Gipson's murder. (Tr 151-52). This left the jury with the obvious inference that since Hayden was convicted of murder petitioner was prosecuted as an aider and abettor to Hayden that petitioner was guilty. No cautionary instruction was given by the court. The courts have ruled that if there is a guilty plea or a conviction of one associated with the same offense on trial that the jury must be instructed not to consider that plea. The court overruled petitioner's objections to this line of inquiry and permitted the witness to answer. (Tr.151-52). Thus, the jury heard the principal being guilty and petitioner, being an aider and abettor to the principal Richard Hayden that he was guilty in this regard. Although Hayden did not plea guilty he was found guilty and the same rules as to a guilty plea is applicable here. "Evidence of . . . guilty pleas is a amenable misuse. Without instruction, it is possible the jury could use the pleas as evidence of . . . guilt. This danger may be averted only by adequate cautionary instructions. . . ." *United States v. Rivera-Santiago*, 872 F.2d 1073, 1084 (1989). Such a limitation would have been appropriate ". . . because admission of a co-defendant's guilty plea can be extremely prejudicial to the defendant given the natural human tendency to assume that if an aider and abettor is guilty, the princpal must also be guilty." *Government of Virgin Islands v. Mujahid*, 990

F.2d 111, 116 (3d Cir.1993). See *United States v. Prawl*, 168 F.3d 622 (2d Cir.1999).

Evidence that a co-conspirator has been convicted is inadmissible because it might cause the jury to "regard the issue of the remaining defendant's guilt as settled and [conclude that] the trial is a mere formality." *United States v. Griffin*, 778 F.2d 707, 711 (11th Cir. 1985). When the co-conspirator testifies it is proper to introduce his prior convictions to assess his credibility. *United States v. Sanders*, 95 F.3d 449, 454 (6th Cir.1996). However, when a conviction is introduced the ". . . court is required to give a cautionary instruction to the effect that the jury may use the conviction or guilty pleas only to determine the testifying witness's credibility." 95 F.3d at 454.

V

Petitioner contends that he was denied his right to present a defense when the court would not instruct the jury on any lesser included offense.

The right to an instruction to an instruction on a lesser included offense is a component of the right to present a defense guaranteed by the constitution. *Washington v. Texas*, 388 U.S.14 (1967).

An instruction on a lesser included offense was noted by the court as a component of the right to present a defense. *Taylor v. Withrow*, 288 F.3d 846 (6th Cir. 2000).

Petitioner requested that the jury be instructed on assault. The evidence presented by petitioner was that petitioner only hit Ollie Gibson and was in no way responsible for the fatal blows to Ollie Gibson. Ollie Gibson died from wounds that he received from the stomping to his head by Richard T. Hayden. (Tr.244). None of these injuries inflicted by petitioner were fatal or contributed to death.

The prosecutor conceded that petitioner did not kick Gipson in the head. ("it's not represented to any of you that Keith Bowles kicked him in the head. . . ." Tr.514).

In these circumstances petitioner was entitled to an instruction on the lesser included offense of assault. The denial of petitioner's request was improper and prejudicial. (Tr.466-67).

Petitioner's entitlement to an instruction on assault was decided in *State v. Cochrane*, 151 Ohio St. 128, 84 N.E.2d 742 (1949). In *Cochrane* the defendant was indicted for murder in the first degree. The victim died as a result of being hit in the jaw. This caused the decedent to fall against a chair occupied by another patron. After the defendant left the scene the decedent died. At trial the case was submitted to the jury on the charge of first degree murder, second degree murder and manslaughter. The defendant was convicted of second degree murder and sentenced accordingly. On further appeal to the Ohio Supreme Court, the court ruled that the defendant was entitled to an instruction on the lesser offense of assault and battery:

> If in the trial on an indictment for murder it is possible under the evidence to acquit the defendant of murder in the first degree, of murder in the second degree, and of manslaughter because the evidence fails to establish beyond a reasonable doubt a casual connection between the criminal agency and the cause of death or because the evidence fails to establish any other essential element of such offenses, it is competent for the jury where the evidence warrant it, to find the defendant guilty of assault and battery only and under such circumstances it is error to the prejudice of the defendant to refuse a request to charged on the lesser offense of assault and battery.

In this case petitioner was entitled to such an instruction. There was ample evidence that petitioner was only guilty of an assault and not of murder. Where the record presents evidence concerning the existence of a lesser offense this the court is duty bound to so instruct the jury.

In *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St. 3d 585, 591, 575 N.E. 828, 831 (1991), the following was stated:

> It is well established that the trial court will not instruct the jury where there is no evidence to support an issue. *Riley v. Cincinnati* (1976), 46 Ohio St. 2d 287, 75 O.O. 2d 331, 348 N.E. 2d 135. However, the corollary of this maxim is also true. "Ordinarily requested instructions should be given if they are correct statements of the law applicable to the fact in the case and reasonable minds might reach the conclusion sought by the instruction." Markus & Palmer, Trial Handbook for Ohio Lawyers (3 Ed. 1991) 860, Section 36:2. See, also *Feterle v. Huettner* (1971), 28 Ohio St. 2d 54, 57 O.O. 2d 213, 275 N.E. 2d 340, at the syllabus: "In reviewing a record to ascertain the presence of sufficient evidence to support the giving of a[n]* * * instruction, an appellate court should determine whether the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction."

An instruction on lesser included offenses is required if the jury could reasonably find against the state on any element of the greater offense. This rule was set forth as follows:

> If the evidence adduced on behalf of the defense is such that if accepted by the trier of fact it would constitute a complete defense to all substantive elements of the crime charged, the trier of fact will not be permitted to consider a lesser included offense unless the trier of fact could reasonably find against the state and for the accused upon one or more of the elements of the crime

> charged, and for the state and against the accused on the remaining elements, which, by themselves, would sustain a conviction upon a lesser included offense.
>
> The persuasiveness of the evidence regarding the lesser included offense is irrelevant. If under any reasonable view of the evidence it is possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense, the instruction on the lesser included offense must be given. The evidence must be considered in the light most favorable to the defendant. *State v. Wilkins*, 64 Ohio St. 2d 283, 388, 415 N.E. 2d 303, 308 (1980). Accord, *State v. Davis*, 6 Ohio St. 3d 91, 95, 451 N.E. 2d 776 (1983); *State v. Solomon*, 66 Ohio St. 2d 214, 421 N.E. 2d 139 (1981).

The Due Process Clause of the Fourteenth Amendment requires that lesser included offenses be submitted to the jury. This was noted by the Supreme Court in *Hooper v. Evans*, 456 U.S. 605 (1982).

> *Beck v. Alabama*, 447 U.S. 625 (1980), held that the due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction. The jury's discretion is thus channeled so that it may convict a defendant of any crime fairly supported by the evidence, Under Alabama law, the rule in non-capital cases is that a lesser included offense instruction should be given if "there is any reasonable theory from the evidence which would support the position." *Fulghum v. State*, 291 Ala.71, 74, 277 So.2d 886, 890 (1973). The federal rule is that a lesser included offense instruction should be given "if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater." *Keeble v. United States*, 413 U.S. 205, 208,

> 93 S.Ct. 1193, 1995, 36 L.Ed2d 844 (1973). The Alabama rule clearly does not offend federal constitutional standards, and no reason has been advanced why it should not apply in capital cases. 456 U.S. at 611-12.

Moreover, other courts have held that it is required that an instruction upon a lesser included offense be given. *Brewer v. Overberg*, 524 F.2d 51 (6th Cir. 1980).

It is "beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of a lesser offense and acquit him of the greater." *Keeble v. United States*, 412 U.S. 205, 208 (1973). See *Sansone v. United States*, 380 U.S. 343, 349 (1965).

VI

The Magistrate Judge, in considering this claim, stated that the presumption given by the trial court was not unconstitutional because of other instructions given. Thus, there was no error. However this was an important component of the instruction.

Although a court is required to consider the entire jury charge, an instruction which relates to the burden of proof and one which relieves the state from proving an element of the offense is subject to special scrutiny. In *Francis v. Franklin*, 471 U.S. 307 (1985), the Supreme Court considered an instruction which stated a presumption. As stated by the court:

> Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. The reviewing court has no way of knowing which of two irreconcilable instructions the jury applied in reaching their verdict. . . . 471 U.S. at 322.

In instructing the jury on aiding and abetting the jury was told that:

Thus, participation in criminal intent may be inferred from the presence, companionship and conduct before and after the offense is committed. (Tr.536). This was improper and unconstitutional.

First, direct evidence was offered on this proposition. The Supreme Court has ruled that a jury should not be instructed on a presumption when evidence is offered on the subject. In *Forbes v. Midwest Air Charter Inc.*, 86 Ohio St.3d 83, 711 N.E.2d 997 (1999), the court informed the jury about a statutory presumption even though evidence had been offered. The court reversed because ". . . the jury in this case should not have been instructed as to the . . . presumption . . . because 'evidence tending to prove a fact . . . , which for procedural purposes would be presumed in the absence of such evidence,' was presented. . . ." 86 Ohio St.3d at 86-87, 711 N.E.2d at 999.

Second, this is unconstitutional because it is arbitrary and unreasonable. There is no rational connection between the fact proven and the fact presumed. Under the instruction the jury could conclude that defendant was guilty as an aider and abetter merely from his presence, companionship and conduct before or after the offense is committed. This is an unconstitutional presumption. *United States v. Gainey*, 380 U.S. 63 (1965); *Tot v. United States*, 319 U.S. 463, 467 (1943); *State v. Swanson*, 52 Ohio App.3d 78, 557 N.E.2d 848 (1989).

Third, this was an improper statement of the law. Even if the evidence of the prosecution is believed, "the mere presence of an accused at or near the scene of the crime does not conclusively establish that the accused committed the crime. . . ." *State v. Weber*, 124 Ohio App.3d 451, 463, 706 N.E.2d 427, 435 (1997). This is instruction is misleading because it goes to aiding and abetting. This evidence occurs

"after the event." Evidence of aiding and abetting must precede the occurrence. Thus:

> Conviction as an aider and abettor in the commission of a crime requires proof beyond a reasonable doubt that the accused advised, hired, incited, commanded, counseled, or otherwise participated as a co-conspirator, or had some connection with the transaction preceding its occurrence other than merely seeking the crime being committed. *State v. Starr*, 24 Ohio App.2d 56, 263 N.E.2d 572 (1970).

Further, in *State v. Sims*, 10 Ohio App. 3d 56, 64, 460 N.E. 2d 672, 676 (1983), the court stated that:

> A frequently quoted definition of "aiding and abetting" is contained in Smith v. State (1931), 41 Ohio App. 64, 67-68, 179 N.E. 696:
>
> "In the absence of a conspiracy or some preceding connection with the transaction, one does not aid and abet if he merely sees a crime being committed." *Goins v. State*, 46 Ohio St. 457, 21 N.E. 476.

Thus, this is a misstatement of the law because the fact that petitioner may have been with Hayden afterwards was allowed to be used by the jury to conclude that petitioner aided and abetted Hayden.

Fourth, such a presumption which foregoes the necessity of proof is unconstitutional, especially where it relieves the state of proving all elements of the offense with evidence beyond a reasonable doubt. *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

Fifth, there is no statutory basis for giving such an instruction whether the presumption be deemed permissive or mandatory. This presumption is no where spelled out in the Ohio Criminal Code.

In Ohio the legislature is the only body that has authority to define crimes. Since this is not set forth in any statute, the court may not usurp a legislative function and instruct the jury with reference to such a presumption. *State ex rel Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.2d 451, 455-56, 715 N.E.2d 1062, 1071 (1999).

Thus, a court has no authority to give a jury instruction concerning a presumption which arises from a judicial decision. If any presumption exists in these circumstances it has to be the result of an act of the legislature and not the court. Even a presumption under Rule 301 of the Ohio Rules of Evidence it refers only to civil actions and presumptions provided for by the General Assembly.

VII

The Magistrate Judge in considering the issue about the court stating that Richard Hayden was an "accomplice" of defendant again misses the point. While the court was required to give an instruction on an accomplice's testimony, it was a jury question whether Hayden was an accomplice. Thus, a correct jury instruction would be that if the jury found that Hayden was an accomplice then his testimony should be reviewed differently from other witnesses. The court, in effect, instructed the jury that Richard Hayden was an accomplice. This was a fact determination that petitioner was an accomplice of Richard Hayden

The court instructed that "Now we had an accomplice testify in this case." (Tr.537). This was objected to by petitioner. (Tr.557-558). This was an unconstitutional comment on the evidence. Whether Richard T. Hayden was or was not an accomplice is a fact question. By designating Richard T. Hayden as "accomplice" the court in effect informed that jury that Hayden was an accomplice of defendant. There is no other way in which this statement could be taken. This denied petitioner a fair trial and invaded the province of the jury.

A fundamental constitutional right is violated because:

> The Constitution gives a criminal defendant the right to have the jury determined, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. . . . *United States v. Gaudin*, 515 U.S.506, 522-23 (1995).
>
> A defendant charged with a serious crime has the right to have the jury determine his guilt or innocence, . . . and a jury's verdict cannot stand if the instructions provided the jury do not require it to find each and every element of the crime under the proper standard of proof, . . . Findings made by a judge cannot cure deficiencies in the jury's findings as to the guilt or innocence of a defendant resulting from a failure to instruct it to find an element of the crime. . . . *Cabana v. Bullock*, 474 U.S. 376, 384-85 (1986).

VIII

The Magistrate Judge, in considering an instruction that the prosecutor was not required to prove a culpable mental state. Since petitioner was tried as an aider and abettor again is in error. Petitioner, who was convicted of the offense of murder and sentenced to a term of imprisonment of fifteen (15) years to life certainly had the right to require the state to prove a culpable mental state in order to convict petitioner.

Petitioner requested that the jury be instructed that causing the death of another must be done knowingly, (Tr.441). The court refused to give such an instruction. Thus, petitioner was strictly liable for the offense without the necessity of proving a culpable mental state. This denied petitioner due process of law. Without such a requirement the indictment would not charge an offense. Further, not giving this instruction resulted in an elementary denial of due process of law.

The Ohio Supreme Court has ruled that "guilty knowledge is an essential ingredient of crime. . . ." *State v. Cameron*, 97 Ohio St.59, 60, 109 N.E.584, 589 (1914).

The elements of criminal liability are set forth in §2901.21(A)-(D) of the Ohio Revised Code. Different degrees of criminal culpability are defined in §2901.22(D) of the Ohio Revised Code. To permit one to be criminally liable without proving a *mens rea* is certainly impermissible. This would not satisfy the constitutional requirement statute be drafted to advise one whether his conduct will come within the proscribed conduct.

Moreover, defendant's act has to be voluntary. §2901.21 of the Ohio Revised Code prescribes culpable criminal behavior:

> (C) As used in this section:
>
> (1) Possession is a voluntary act if the possessor knowingly procured or received the thing posses, or was aware of his control thereof for a sufficient time to have ended his possession.
>
> (2) Reflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts.

Thus, criminal liability must be based on more than what is required for liability for negligence in a civil action. The instruction given by the court did not require such proof.

Where criminal liability, and especially felony liability is involved, the state must comport with constitutional guidelines. Thus, actual knowledge is required. Otherwise, the statute would be unconstitutional. *United States v. Wolff*, 785 F.2d 1121 (6th Cir.1985).

The court instructed the jury on flight:

> In this case there has been evidence presented that the defendant, Keith Bowles, fled from the Argonne Arms, the vicinity of the alleged crime, and then remained at large. In regarding this evidence you are instructed that flight in and of itself does not raise a presumption of guilt but it may tend to show consciousness of guilt or a guilty conscience with the crime.
>
> If, therefore, you find that the defendant did flee from the Argonne Arms, the vicinity of the alleged crime, and then remained at large, you may consider these circumstances in the case in determining the guilt or innocence of the defendant. (Tr.536-37).

A flight instruction was inappropriate because petitioner had no other means to get from Painesville to Cleveland, (Tr.120). Jamal Russell drove the car with defendant in the rear seat. (Tr.136). The police even waived them on to leave the area. (Tr.137). Afterwards Jamal Russell switched seats with Hayden driving. (Tr.138). The officer told all to leave and petitioner was driven back to Cleveland. (Tr.174).

In *Dillion v. State*, 7 Ohio L.Abs.46 (Ct.App.1928), the court stated that "the circumstances of flight is as consistent with the theory of innocence as of guilt so far as the charge is concerned."

In another federal case, the following was stated concerning the matter of flight.

> The conduct of an accused person in seeking to flee following the commission of an alleged crime may be circumstantially relevant to probe both the commission of the act and the intent and purpose with which it was committed. . . . But in order to have such relevance, it must be shown that the person attempting to flee had reason to believe that he was being, or would be, sought

in connection with the commission of the particular offense in question. *Embree v. United States*, 320 F.2d 666, 668 (9th Cir.1963).

IX

The Magistrate Judge does not consider properly the misconduct of the prosecuting attorney during final argument. The Court of Appeals found that it was error but it was harmless error However the court undertook an improper harmless error analysis.

Constitutional error can be said to be harmless only if "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). Second, in *Chapman*, the court ruled that "constitutional error . . . casts on someone other than the person prejudiced by it a burden to show that it was harmless." 386 U.S. at 24.

A number of improper statements were made by the prosecutor during the trial including statements as to what constitutes evidence. *Kincade v. Sparkman*, 175 F.3d 444 (6th Cir. 1999).

1. The prosecutor made much of the fact that petitioner did not come in and talk to the police. As stated previously, even if petitioner did turn himself in, he certainly did not have to make a statement. (See pp. 5-9, *infra*)

The prosecutor argued that "Why do you think the other people came in, hey, I just kicked the dude, I didn't shoot no one?" (Tr.479).

Even though an objection was sustained the prosecutor went on to argue that this showed a consciousness of guilt.

> Now ladies and gentlemen, you will also hear the judge instruct you on flight, what constitutes flight. You heard the evidence, this thing rook place on August 23rd, Mr. Bowles knew darn well that something bad happened to these guys. He knew there was a death, he

knew there were two deaths. Two of his lifelong buddies went in and talked to the police and gave statements, they all me back at the Keyhole that night, they knew what happened, Mr. Bowles doesn't turn himself in—

MR. MANCINO: Objection.
THE COURT: Overruled. (Tr.483-84).

Later, the following argument was made:

Within the week Mr. Russell came in and talked, Mr. Anderson came in and talked, Mr. Hayden came in and talked, Mr. Bowles didn't come in. Mr. Bowles went out and he had breakfast that morning not far from MetroHealth Center according to his testimony, Ollie Gipson died at 9:25 a.m., on the 23rd of August—

MANCINO: Objection.
MR. HACKMAN: —in the City of Cleveland—
THE COURT: Overruled. (Tr.486)

These arguments equate flight with exercising a constitutional right against self-discrimination. This was improper argument. *Minor v. Black*, 527 F.2d 1 (6th Cir.1975). Petitioner was denied a fair trial. *Martin v. Parker*, 11 F.3d 613 (6th Cir.1994); *Sizemore v. Fletcher*, 921 F.2d 667 (6th Cir.1990).

2. The prosecutor improperly stated that defendant was guilty:

Ladies and gentlemen, Mr. Bowles is guilty. (Tr.486).

United States v. Fullerton, 187 F.3d 587, 592 (6th Cir. 1999), "The rule of law in Ohio is well settled that a prosecutor commits reversible error in stating in argument to a jury that in his personal opinion a defendant in a criminal case is guilty of the crime charged." *State v. Thayer*, 124 Ohio St.1, 176 N.E.656 (1931) at syllabus.

Improper statements concerning the evidence, even if unobjected to, are reversible error. *State v. LaFreniere*, 85 Ohio App.3d 840, 853-54, 621 N.E.2d 812, 821-22 (1993).

3. The prosecutor further improperly argued as to what the law was and what had to be proven in the case. First the prosecutor stated that the case had nothing to do with the defendant intending to kill anyone. (Tr.474). Then the prosecutor improperly stated what constitutes aiding and abetting, "You will hear the Judge instruct you that one who aids and abets another is just as guilty . . . as the principal offender. You will be instructed that active participation, however slight, is aiding and abetting another person. (Tr.475).

This is an improper statement of aiding and abetting, which oversimplifies and misstates the law.

Thereafter, the prosecutor stated that they did not have to prove that the three of them specifically intended to cause serious physical harm. (Tr.505-06).

4. The prosecutor maligned defense counsel. The prosecutor attempted to give his opinion as to what statements of Richard Hayden were the truth.

> Richard Hayden, what he's trying to tell you to listen to and told you Mr. Bowles kicked him one time. Now remember Mr. Hayden's testimony, Mr. Hayden every time in his prior statement that he made, prior statement of his was all, all three of us were kicking, then Mr. Mancino put the words his mouth about one kick and he would agree to that.
>
> MR. MANCINO: Objection.
> THE COURT: Overruled. (Tr.514)

Thereafter, the following was stated:

> But Barbara Adeyemi, Mr. Mancino talks about her statement to the police and he's trying to say to you here that she never told the police and he's trying to say to

you here that she never told the police the three of them were beating this man, that's not true.

MR. MANCINO: Objection.
MR. CULOTTA: That is not true—
THE COURT: Overruled.
MR. CULOTTA:—and not what she said. In fact the statement he was reading to you it starts off one of the three beaters.
MR. MANCINO: Objection.
THE COURT: Overruled. (Tr.515)

This denigrates defense counsel and is improper. *State v. Keenan*, 66 Ohio St.3d 402, 406, 613 N.E.2d 203, 207 (1993). ("It is improper to denigrate defense counsel in the jury's presence for making objections. . . .").

X

The Magistrate Judge in considering the constitutional arguments misapplied the Equal Protection Clause. Petitioner need not assert he was a member of a suspect class. However petitioner claimed that persons charged with the same offense are treated differently. The Due Process Clause and Equal Protection Clause of the Ohio Constitution are the equivalent of the federal guarantees. Thus, reference to state cases applies equally to this case in a federal court.

Murder, which carried a penalty of fifteen (15) years to life, contained essentially the same elements of involuntary manslaughter which carried a maximum sentence of ten (10) years. However, by using the same elements of involuntary manslaughter petitioner was sentenced to fifteen (15) years to life. It thus violated his right of due process and equal protection of the law.

Petitioner was indicted on September 4, 1998 under the newly enacted form of murder. The indictment alleged as follows:

> On or about the 23rd day of August, 1998, at the City of Painesville, Lake County, Ohio, one KEITH BOWLES aka "K.B.", did cause the death of Ollie T. Gipson as a proximate result of KEITH BOWLES aka "KB." Committing or attempting to commit an offense of violence that is a felony of the first or second degree, to-wit: Felonious Assault, in violation of Section 2903.11 of the Revised Code.

This version of defining murder is contained in §2903.02 (B)-(C) of the Ohio Revised Code:

> (B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of Section 2903.03 or 2903.04 of the Revised Code.
>
> (C) Division (B) of this section does not apply to an offense that becomes a felony of the first or second degree only if the offender previously has been convicted of that offense or another specified offense.

This statute is unconstitutional. It constitutes a denial of equal protection of law and is arbitrary, capricious and unreasonable.

In effect, the Ohio General Assembly has retained the traditional definition of murder which is to purposely cause the death of another while also calling it murder which is the functional equivalent of involuntary manslaughter.

This statute was unreasonable and arbitrary because to commit murder while in the commission of certain specified felonies does not even require a culpable mental state. Moreover, there must be no proof that the person purposely caused the death of another. Murder has always been, in Ohio history, an intentional act. Since murder carries a penalty of

fifteen (15) years to life, involuntary manslaughter as either a felony of the first degree or third degree, only carries a maximum sentence often (10) years. Thus, by committing the very same act, different penalties are prescribed. The statute is unconstitutional because, in one form of murder the act be done "purposely", and the other eliminates of any culpable mental state. Disparate elements and penalties for the same act result.

It is hard to conceive that a murder could be committed without also committing some underlying felony. The new murder statute states that the act must be committed while committing or attempting to commit an offense of violence which is a felony of the first or second degree and which is not a violation of §2903.03 or §2903.04 of the Ohio Revised Code. This makes little sense. Without requiring a culpable mental state of purposely or a purpose to cause the death of another the new murder statute cannot pass constitutional muster.

Thus, what Ohio Revised Code §2903.02(B)-(C) does is to create two classifications of murder. However, there are less elements and an absence of a culpable mental state in murder under the newly enacted version contained in §2903.02(B) of the Ohio Revised Code. Given that there is no culpable mental state and no requirement that the act be done purposely and the same penalty result reeks of fundamental unfairness. It treats persons similarly situated completely different and imposes a greater penalty for an act which would essentially constitute involuntary manslaughter.

The statute requires that there be an "offense of violence." That term is defined broadly in §2901.01(A)(9) of the Ohio Revised Code. There are approximately thirty-two (32) specific statutes in Ohio which could constitute offenses of violence. What is particularly revealing is that an offense of violence must be ". . . committed purposely or knowingly, and involving physical harm to persons or a risk of serious

physical harm to persons; . . ." Thus, by definition an "offense of violence must be committed purposely or knowingly". Yet in this new version the death need not be caused either "purposely" and "knowingly" to constitute the offense of murder.

This is not just an example of poor legislative draftsmanship but evidences a statute that lacks required constitutional uniformity to satisfy the due process clause or the equal protection clauses of the Ohio and Federal Constitutions. It creates two classes of individuals who may be convicted of murder one whom must cause the death "purposely" and in the other one only must cause the death of another while committing or attempting to commit a specified offense of violence.

The Ohio Supreme Court has stated that the Fourteenth Amendment to the United States Constitution and Section 2, Article I of the Ohio Constitution require ". . . that all similarly situated individuals be treated in a similar manner. . . . In other words, laws are to operate equally upon persons who are identified in the same class." *State ex rel. Patterson v. Industrial Comm'n.*, 77 Ohio St.3d 201, 204, 672 N.E.2d 1008, 1011 (1996).

The Ohio Supreme Court has stated that a law, constitutional on its face, can be unconstitutional in its application:

> "[D]iscrimination against individuals or groups is sometimes an inevitable result of the operation of a statute." *Roseman v. Firemen & Policemen's Death Benefit Fund* (1993), 66 Ohio St.3d, 443, 446, 613 N.E.2d 574, 577. "The mere fact that a statute discriminates does not mean that the statute must unconstitutional" *Id.* at 446-447, 613 N.E.2d at 577.
>
> In determining whether a statute violates equal protection, we examine the class distinction dawn to decide if a suspect class or fundamental right is involved in

order to determine what level of scrutiny to apply. *Id.* at 447, 613 N.E.2d at 577. The right to sue a political subdivision has been held not be a fundamental right. *Fabrey, supra*, 70 Ohio St.3d at 353, 639 N.E.2d at 33. Moreover, this case does not involve a suspect class which has been traditionally defined as one involving race, national origin, religion, or sex. *Id.* Therefore, rather than apply heightened scrutiny, we review the statue accordingly to the "rational basis" test. Consequently, the statute must be upheld if it bears a rational relationship to a legitimate governmental interest. *Roseman, supra*, 66 Ohio St.3d at 447, 613 N.E.2d at 577. However, a statutory classification will be found to violate equal protection if it treats similarly situated people in a different manner based upon illogical and arbitrary basis. *Morris v. Savoy* (1991), 61 Ohio St.3d 684, 711, 576 N.E.2d 765, 785, citing *Stated v. Buckley* (1968), 16 Ohio St.2d 128, 45 0.0.2d 469, 243 N.E.2d 66 (A.W. Sweeney, J., concurring in part and dissenting in part). *Adamsky v. Buckeye Local School District*, 73 Ohio St.3d 360, 362, 653 N.E.2d 212, 214 (1995).

This statute smacks of fundamental unfairness and is unconstitutional in its application. In cases where the Supreme Court has ruled that statutes which apply differently to persons in similar circumstances are unconstitutional as denying equal protection of the law. *See Caruso v. Aluminum Co. of America*, 15 Ohio St.3d 306, 473 N.E.2d 818 (1984); *State ex rel. Nytray v. Industrial Comm'n*, 2 Ohio St.3d 173, 443 N.E.2d 962 (1983).

XI

Petitioner contends there was insufficient evidence to convict him of murder. While there is evidence of assault, assault is not murder.

A.

Petitioner, who was prosecuted in a hybrid fashion as a principal offender and as an aider and abettor, was found guilty. The jury returned a specific finding that defendant was attempting to commit felonious assault.

Recently revised §2903.02(B) of the Ohio Revised Code created a new category of murder as follows:

> No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of Section 2903.03 or 2903.04 of the Revised Code.

Felonious assault is felony of the second degree unless it involves a peace officer. Ohio Rev.Code §2903.11. There is no claim that the deceased in this case was a peace officer.

Thus, the substantive offense of felonious assault would be a felony of the second degree. An attempt to commit felonious assault is a felony of the third degree. Section 2923.02(A) of the Ohio Revised Code provides that "An attempt to commit any other offense is an offense of the next lesser degree than the offense attempted. . . ."

Consequently, an attempt to commit felonious assault would be a felony of the third degree and does not qualify as the predicate felony for murder.

This is a criminal statute. As required by §2901.04(A) of the Ohio Revised Code, "Sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused."

However, since the underlying offense of felonious assault as applicable to this case was a felony of the second degree, an attempt to commit that felony results in a felony of the third degree. Thus, the murder statute is inapplicable.

Further, the imposition of a term of imprisonment of 15 years to life results in a cruel and unusual punishment under the circumstances of this case. Petitioner was in the vehicle when fatal blows were inflicted by Richard Hayden. Petitioner did not urge, incite, counsel or direct Richard Hayden. Richard Hayden testified that he did this on his own without any participation of any other person. The resulting penalty in this case certainly does not fit the offense and results in a cruel and unusual punishment. The prosecution enhanced an assault, a misdemeanor of the first degree, to the offense of murder. This is clearly unconstitutional.

B.

Richard Hayden testified that defendant just "skimmed" the back of Gipson's head. (Tr.98). Petitioner just "skimmed" Gipson (Tr.100). Afterwards, Damon Anderson (Long) punched Gipson twice in the face. (Tr.100). Hayden then kicked him. At most, petitioner "probably kicked him once" which was "somewhere down around the legs or something." (Tr.101) Afterward "I kicked him maybe one or twice more." (Tr. 103).

Petitioner had no intention of beating anyone up. He was just a quiet person. (Tr.120-21). Gipson approached the car in a menacing manner when petitioner got out of the car. (Tr.123). Petitioner only "skimmed" Gipson which did no damage. (Tr.125)

After Gipson stumbled back Hayden "grabbed him, threw him down, tripped him down," (Tr.125). Petitioner had nothing to so with getting Gipson to the ground. (Tr.125).

Petitioner did not urge Hayden to do any damage. (Tr.125). Petitioner only kicked Gipson in the legs, (Tr. I 26), which did no damage. (Tr.127). Petitioner did not urge Anderson to kill Gipson. (Tr.127). Hayden was alone with Gipson and continued to kick him. (Tr.128). Hayden did throw Gipson to the ground. (Tr.129). Petitioner was in the car at this time,

(Tr.129-30), and said nothing to either Hayden or Anderson. (Tr.130). Hayden kicked Gipson straight on and Gipson did not get up. (Tr.131). Hayden said he did not intend to cause the death of Gipson. (Tr.140).

The whole purpose of going to Argonne Arms was to get "Stickman" (Antonio Rymmer) and "kick his ass". (Tr.163-64). Gipson approached the car with his hand in his shirt. (Tr.166, 192). It was thought that Gipson had a gun. (Tr.167). Petitioner only kicked Gipson. Afer petitioner got in the car Hayden "stomped on the guy's head three times. . . ." (Tr.168). No one had a gun or weapon. There was no prior plan to beat someone up. (Tr.186)

Russell did not know how Gipson wound up on the ground. (Tr.194). Petitioner only punch Gipson in the case. (Tr.195). Gipson was only kicked in the stomach by petitioner according to Russell. (Tr.196). Petitioner got back into the car when Hayden did this stomping entirely on his own, (Tr.197), while petitioner is seated in the back seat of the car. (Tr.198).

Further in this case there is insufficient evidence to prove defendant aided and abetted Richard Hayden. Richard Hayden testified that he inflicted the fatal blows on his own. Petitioner did not in any way participate in that fatal confrontation. It cannot be said as a matter of law that defendant was an aider and abettor in these circumstances.

The appropriate standard to determine whether one may be convicted as an aider and abettor was set forth in the syllabus in *State v. Starr*, 24 Ohio App. 2d 56, 263 N.E. 2d 572 (1970):

> Conviction as an aider and abettor in the commission of a crime requires proof beyond a reasonable doubt that the accused advised, hired, incited, commanded, counseled, or otherwise participated as a co-conspirator, or had some connection with the transaction preceding its

occurrence other than merely seeking the crime being committed.

It is apparent from the foregoing that there was insufficient evidence to convict the petitioner of aiding and abetting. It should be noted that under the complicity statute, §2923.03 of the Ohio Revised Code there are four forms of complicity. One of those is soliciting or procuring another to commit the offense. There is no evidence in this record and the petitioner was not charged with soliciting or procuring. It specifically charged with aiding and abetting another in the commission of the offense. Consequently, the conviction in this case violates elementary precepts of due process of law. There was clearly insufficient evidence to permit a rational factfinder to return a verdict of guilty.

Petitioner states that numerous constitutional errors were committed during the course of the proceedings. Petitioner is entitled to habeas corpus relief Thus the report and recommended decision of the Magistrate Judge must be rejected and a writ of habeas corpus issued to petitioner.

/s/ Paul Mancino
PAUL MANCINO, JR. (00155760
Attorney for Petitioner
75 Public Square #1016
Cleveland, Ohio 44113-2098
(216) 621-1742

SERVICE

A copy of the foregoing Objections and Exceptions to the Report and Recommended Decision of the Magistrate Judge has been mailed to Bruce Horrigan, Assistant Attorney General, State Office Building, Corrections and Litigation Section, 11th Floor, 615 West Superior Avenue, Cleveland, Ohio 44113-1899, on this 27th day of June, 2003.

/s/ Paul Mancino
PAUL MANCINO, JR. (0015576)
Attorney for Petitioner

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:02 CV 1520
Judge Donald C. Nugent
Magistrate Judge Streepy

KEITH BOWLES,
Petitioner,

v.

HARRY RUSSELL, Warden,
Respondent.

RESPONDENT'S RESPONSE TO PETITIONER'S OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Petitioner's objections to the Magistrate Judge's Report and Recommendation fail to assert any new law or arguments in support of his petition, which have not already been adequately addressed by the Court. As and for his response, Respondent accepts the Court's analysis and incorporates those findings together with the arguments previously set forth in his answer and return of writ. Respondent respectfully submits that the well reasoned Report and Recommendation should be adopted as the Order of this Court.

Respectfully submitted,

JIM PETRO (0022096)
Ohio Attorney General

/s/ Bruce D. Horrigan
BRUCE D. HORRIGAN (0047170)
Assistant Attorney General
Corrections Litigation Section
615 West Superior Avenue, 11th Floor
Cleveland, Ohio 44113-1899
bhorrigan@ag.state.oh.us
(216) 787-3030
(216) 787-3480 Fax

Counsel for Respondent
Harry Russell, Warden

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was forwarded to counsel for Petitioner, Paul A. Mancino, Jr., Suite 1016, 75 Public Square, Cleveland, Ohio 44113 by regular U.S. mail this 10th day of July, 2003.

/s/ Bruce D. Horrigan
BRUCE D. HORRIGAN (0047170)
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:02 CV 1520
JUDGE DONALD C. NUGENT

KEITH BOWLES,

Petitioner,

v.

HARRY RUSSELL,

Respondent.

MEMORANDUM OPINION

This matter is before the Court upon the Report and Recommendation of Magistrate Judge Jack B. Streepy (ECF # 17) recommending that the Court dismiss the Petition for a Writ of Habeas Corpus brought by a Person in State Custody pursuant to 28 U.S.C. § 2254 (ECF # 1). Objections have been filed to the Report and Recommendation.

This Court has reviewed the Magistrate Judge's Report and Recommendation *de novo*. See Fed. R. Civ. P. 72(b). The Court has considered all of the pleadings, affidavits, motions and filings of the parties as well as Petitioner's objections. After review, this Court adopts the well-reasoned and thoroughly analyzed opinion of the Magistrate Judge as its own. Magistrate Judge Streepy correctly determined that Petitioner is not entitled to relief pursuant to 28 U.S.C. § 2254.

The Report and Recommendation of the Magistrate Judge is, therefore, hereby ADOPTED. For the reasons set forth by the Magistrate Judge, Petitioner's petition for a writ of habeas corpus is denied. The Court further certifies, pursuant to 28

U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and there is no basis upon which to issue a certificate of appealability. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

/s/ Donald C. Nugent
DONALD C. NUGENT
United States District Judge

DATED: 7/10/03

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:02 CV 1520

JUDGE DONALD C. NUGENT

KEITH BOWLES,

Petitioner,

v.

HARRY RUSSELL,

Respondent.

JUDGMENT

In accordance with the Memorandum Opinion of this date, Petitioner's motion filed pursuant to 28 U.S.C. § 2254 (ECF # 1) is DENIED. The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and there is no basis upon which to issue a certificate of appealability. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

/s/ Donald C. Nugent
DONALD C. NUGENT
United States District Judge

DATED: 7/10/03

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed AUG 6, 2003]

CASE NO. 1:02 CV 1520
JUDGE DONALD C. NUGENT

KEITH BOWLES,

Petitioner,

v.

HARRY RUSSELL,

Respondent.

MOTION FOR A NEW TRIAL OR TO
ALTER AND AMEND JUDGMENT

Now comes petitioner, Keith Bowles, pursuant to Rules 52 and 59 of the Federal Rules of Civil Procedure and moves that the court alter and amend the order entered July 28, 2003.

The undersigned, on July 31, 2003, received the following terse notices from the court. The court stated there was memorandum opinion adopting the Magistrate Judge's report and recommended decision. However no memorandum was attached and the cryptic statement did not identify any such document.

There is no indiction on the attachments that the objections were considered by the court which were filed by petitioner.

Petitioner filed objections pointing out deficiencies in the report and recommended decision of the Magistrate Judge. Petitioner was entitled to a *de novo* review of the entire record. It does not appear that was done from the attached orders.

Petitioner therefor requests that the court alter and amend its judgment and consider petitioner's objection and grant appropriate habeas corpus relief.

/s/ Paul Mancino, Jr.
PAUL MANCINO, JR. (0015576)
Attorney for Petitioner
75 Public Square #1016
Cleveland, Ohio 44113-2098
(216) 621-1742

SERVICE

A copy of the foregoing *Motion for a New Trial or to Alter and Amend Judgment* has been mailed to Bruce Horrigan, Assistant Attorney General, State Office Building, Corrections and Litigation Section, 11th Floor, 615 West Superior Avenue, Cleveland, Ohio 44113-1899, on this 6th day of August, 2003.

/s/ Paul Mancino, Jr.
PAUL MANCINO, JR. (0015576)
Attorney for Petitioner

Motion Denied. s/Donald C. Nugent, U.S. District Judge
Case 1:02-cv-01520-DCN Document 25 Filed 09/09/2003

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed AUG 6, 2003]

CASE NO. 1:02 CV 1520
JUDGE DONALD C. NUGENT

KEITH BOWLES,

Petitioner,

v.

HARRY RUSSELL,

Respondent.

MOTION FOR A NEW TRIAL OR TO
ALTER AND AMEND JUDGMENT

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Petitioner therefor requests that the court alter and amend its judgment and consider petitioner's objection and grant appropriate habeas corpus relief.

/s/ Paul Mancino, Jr.
PAUL MANCINO, JR. (0015576)
Attorney for Petitioner
75 Public Square #1016
Cleveland, Ohio 44113-2098
(216) 621-1742

SERVICE

A copy of the foregoing *Motion for a New Trial or to Alter and Amend Judgment* has been mailed to Bruce Horrigan, Assistant Attorney General, State Office Building, Corrections and Litigation Section, 11th Floor, 615 West Superior Avenue, Cleveland, Ohio 44113-1899, on this 6th day of August, 2003.

/s/ Paul Mancino, Jr.
PAUL MANCINO, JR. (0015576)
Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed DEC. 12, 2003]

CASE NO. 1:02 CV 1520
JUDGE DONALD C. NUGENT

KEITH BOWLES,

Petitioner,

v.

HARRY RUSSELL,

Respondent.

MOTION TO VACATE AND TO
REOPEN TIME TO APPEAL

Now comes petitioner, Keith Bowles, pursuant to Rule 77 of the Federal Rules of Civil Procedure and Rule 4(a)(6) of the Federal Rules of Appellate Procedure and moves that the order apparently entered September 9, 2003 denying a motion for a new trial be vacated because the undersigned was never sent nor did the undersigned ever received notification of that order.

The undersigned, on December 5, 2003, obtained a docket in the above case. For the first time the undersigned noticed that the court entered an order denying petitioner's motion for a new trial or to alter and amend judgment which had been filed on August 6, 2003. The docket does not reflect that this order was sent to anyone and the undersigned has never received this order. The first time the undersigned was aware of this order was when the undersigned reviewed the docket on December 5, 2003.

Rule 77(d) of the Federal Rules of Civil Procedure provides that immediately upon entry of an order or judgment the clerk shall serve a notice of the entry by mail in a manner provided for in Rule 5 of the Federal Rules of Civil Procedure. It further provides that lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed except as permitted by Rule 4(a) of the Federal Rules of Appellate Procedure.

Rule 4(a)(6) of the Federal Rules of Appellate Procedure provides the following:

> Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:
>
> (A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;
>
> (B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry, and
>
> (C) the court finds that no party would be prejudiced.

Wherefore, petitioner moves that the order be vacated and that petitioner may timely file a notice of appeal.

/s/ Paul Mancino, Jr.
PAUL MANCINO, JR. (0015576)
Attorneys for Petitioner
75 Public Square #1016
Cleveland, Ohio 44113-2098
(216) 621-1742

SERVICE

A copy of the foregoing *Motion to Vacate* has been mailed to Bruce Horrigan, Assistant Attorney General, State Office Building, Corrections and Litigation Section 11th Floor, 615 West Superior Avenue, Cleveland, Ohio 44113-1899, on this 12th day of December, 2003.

/s/ Paul Mancino, Jr.
PAUL MANCINO, JR. (0015576)
Attorney for Petitioner

STATE OF OHIO :

: *SS*

CUYAHOGA COUNTY:

AFFIDAVIT

I, PAUL MANCINO, JR., being duly sworn, deposes and states the following:

1. He is the Attorney for petitioner Keith Bowles in the within action; that he filed the petition for writ of habeas corpus and filed all pleadings in connection with this case.

2. Affiant states that at no time did he ever receive an order from the court or the clerk that the court had denied petitioner's motion for a new trial or to alter and amend judgment which was entered on the docket on September 9, 2003.

3. Affiant states that the first notice the undersigned had that the petition had been overruled was when the undersigned obtained a copy of the court's docket on December 5, 2003; that at no time did the undersign ever receive a copy of the order from either the court or the clerk.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Paul Mancino, Jr.
PAUL MANCINO, JR.

SWORN TO AND SUBSCRIBED, in my presence on this 9th day of December, 2003.

/s/ Carla Ann DeRose
Notary Public

No
Expiration Date

As to Re-Opening of Appeal to Rule 4(a)(6). Appeal to be filed by 2/27/04. Motion Denied as to Motion to Vacate GRANTED X DENIED _ IT IS SO ORDERED
/s/ Donald C. Nugent 2/10/04, U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed DEC. 12, 2003]

CASE NO. 1:02 CV 1520
(JUDGE DONALD C. NUGENT)

KEITH BOWLES,
Petitioner,

vs.

HARRY RUSSELL, Warden,
Respondent.

MOTION TO VACATE AND TO
REOPEN TIME TO APPEAL

Now comes petitioner, Keith Bowles, pursuant to Rule 77 of the Federal Rules of Civil Procedure and Rule 4(a)(6) of the Federal Rules of Appellate Procedure and moves that the order apparently entered September 9, 2003 denying a motion for a new trial be vacated because the undersigned was never sent not did the undersigned ever received notification of that order.

The undersigned, on December 5, 2003, obtained a docket in the above case. For the first time the undersigned noticed that the court entered an order denying petitioner's motion for

a new trial or to alter and amend judgment which had been filed on August 6, 2003. The docket does not reflect that this order was sent to anyone and the undersigned has never received this order. The first

* * * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed FEB. 26, 2004]

CASE NO. 1:02 CV 1520
(JUDGE DONALD C. NUGENT)

KEITH BOWLES,
Petitioner-Appellant,

vs.

HARRY RUSSELL, Warden,
Respondent-Appellee.

NOTICE OF APPEAL

Now comes petitioner-appellant, Keith Bowles, and hereby gives notice of appeal to the United States Court of Appeals for the Sixth Circuit from the judgment and final order of the United States District Court dismissing his petition for writ of habeas corpus, and from the order of the United States District Court overruling his motion for a new trial or to alter and amend judgment, which judgments and final orders were entered on July 10, 2003 and September 9, 2003.

This notice of appeal is being filed pursuant to an order granting petitioner's motion to reopen his appeal which order was entered on February 10, 2004.

/s/ Paul Mancino, Jr.
PAUL MANCINO, JR. (0015576)
Attorney for Petitioner-Appellant
75 Public Square, #1016
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(216) 621-1742
(216) 621-8465 (Fax)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed MAR. 10, 2004]

No. 04-3262

KEITH BOWLES,
Petitioner-Appellant,

v.

HARRY RUSSELL, Warden,
Respondent-Appellee.

ORDER

It appears from the documents before the court that the judgment of the district court was entered July 28, 2003. A time-tolling motion for new trial or to alter or amend the judgment was denied by order entered September 9, 2003. Counsel for the appellant filed on December 12, 2003 a Fed. R. App. P. 4(a)(6) motion to reopen the appeal period. By marginal ruling, the district court judge granted the motion, and directed that a notice of appeal be filed by February 27, 2004. However, Fed. R. App. P. 4(a)(6) limits the district court to reopening "the time to file an appeal for a period of 14 days after the date when its order to reopen is entered . . . ." The ruling granting the motion to reopen was entered on February 10, 2004. Pursuant to Fed. R. App. P. 4(a)(6), the district court was only permitted to reopen the appeal period until February 24, 2004. *See* Fed. R. App. P. 26(a). The notice of appeal filed on February 27, 2004 was late. *See* Fed. R. App. P. 4(a) and 26(a).

It is therefore ordered that appellant show cause in writing not later than twenty-one days from the date of this order why the appeal should not be dismissed for lack of jurisdiction.

It is further ordered that the briefing schedule be held in abeyance pending the resolution of the question of jurisdiction.

ENTERED PURSUANT TO RULE 45(a)
RULES OF THE SIXTH CIRCUIT
Leonard Green, Clerk

/s/ Leonard Green
LEONARD GREEN

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 04-3262

KEITH BOWLES,
Petitioner-Appellant,

v.

HARRY RUSSELL, Warden,
Respondent-Appellee.

RESPONSE TO ORDER OF MARCH 10, 2004

The court, in its order dated March 10, 2004, states that the notice of appeal was not timely filed. The court correctly notes that the District Court granted the motion to reopen the appeal. The court specifically stated that the notice of appeal had to be filed by February 27, 2004. Petitioner- appellant and counsel relied on the ruling from the court that the notice of appeal could be filed by February 27, 2004. Accordingly, the notice of appeal was filed on February 26, 2004 in accordance with the order issued by the District Court.

Rule 6(b) of the Federal Rules of Civil Procedure allows a court to enlarge the time in which to perform or do an act required by law. The only exception is that a court may not extend the time for taking action under Rule 50(b) and (c)(2), 52(b), 59(d) and (e), and 60(b). Since the District Court had jurisdiction to enter the order that it did enter the court certainly had jurisdiction and authority to extend that time when not specifically prohibited by law. Since the District Court was not prohibited for making the order that it did, the court certainly had a right to extend the time to perform the act.

In any event, the Court of Appeals has jurisdiction to review the order of the District Court which was entered on

February 10, 2004. The notice of appeal was filed within thirty (30) days of the date of that order. Petitioner should not be deprived of his right of an appeal when he was never given notice of the order overruling his motion for a new trial or to alter and amend judgment.

Rule 77(d) of the Federal Rules of Civil Procedure provides that immediately upon entry of an order or judgment the clerk shall serve a notice of the entry by mail in a manner provided for in Rule 5 of the Federal Rules of Civil Procedure. It further provides that lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed except as permitted by Rule 4(a) of the Federal Rules of Appellate Procedure.

The District Court was presumably aware of the fourteen day rule and extended that time on its own thus giving petitioner-appellant until February 27, 2004 to file his notice of appeal. Petitioner-appellant filed his notice of appeal on February 26, 2004 within the time period as enlarged by the District Court. Therefore this appeal should not be dismissed and should proceed accordingly.

/s/ Paul Mancino, Jr.
PAUL MANCINO, JR. (0015576)
Attorney for Petitioner-Appellant
75 Public Square, #1016
Cleveland, Ohio 44113-2098
(216) 621-1742
(216) 621-8465 (Fax)

SERVICE

A copy of the foregoing Response to Order of March 2004 was mailed to Bruce D. Horrigan, Assistant Attorney General Corrections and Litigation Section, State Office Building, 11th Fl. 615 West Superior Avenue, Cleveland, Ohio 44113-1899, on this 26th day of March, 2004.

/s/ Paul Mancino, Jr.
PAUL MANCINO, JR. (0015576)
Attorney for Petitioner-Appellant

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed APR 26, 2004]

No. 04-3262

KEITH BOWLES,
Petitioner-Appellant,
v.

HARRY RUSSELL, Warden,
Respondent-Appellee.

ORDER

Before: RYAN, DAUGHTREY, and CLAY, *Circuit Judges.*

This matter is before the court upon consideration of the appellant's response to this court's order directing him to show cause why his appeal should not be dismissed for lack of jurisdiction on the basis of a late notice of appeal. Counsel for the appellant has filed a response in which he states that he filed a notice of appeal within the appeal period which was reopened by the district court; that Fed. R. Civ. P. 6(b) allows a court to enlarge the time period to perform or do an act required by law; and that the district court had the right to extend the time for filing the notice of appeal. Counsel also argues that the notice of appeal was timely filed from the February 10, 2004 order reopening the appeal period, and that the appellant should not be deprived of his right to appeal because he never received notice of the ruling on the motion for a new trial or to alter or amend the judgment.

It appears from the documents before the court that the district court's memorandum opinion and separate judgment were entered July 28, 2003. The motion for a new trial or to

alter or amend the judgment was filed on August 6, 2003 and tolled the appeal period. *See* Fed. R. App. P. 4(a)(4). The motion was denied by order entered September 9, 2003. Counsel for the appellant filed a Fed. R. App. P. 4(a)(6) motion on December 12, 2003 seeking to vacate the order denying the motion for a new trial and to reopen the appeal period. The motion also quoted the entire language of Fed. R. App. P. 4(a)(6). By marginal ruling dated and entered February 10, 2004, the district court judge directed that the notice of appeal be filed by February 27, 2004 as directed by Fed. R. App. P. 4(a)(6), and denied the portion of the motion seeking to vacate the order denying the motion for a new trial. The notice of appeal was filed on February 26, 2004.

Although the notice of appeal was filed within the appeal period as reopened by the district court, Fed. R. App. P. 4(a)(6) provides that "[t]he district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered . . . ." The district court's ruling entered February 10, 2004 gave the appellant until February 27, 2004 in which to file a notice of appeal. This was seventeen days rather than the permitted maximum of fourteen days. Fed. R. App. P. 26(a) provides that weekends and holidays be deleted from the computation of time only when the prescribed period is less than eleven days. Fed. R. App. P. 4(a)(6) is the exclusive method for reopening or enlarging the appeal period when the appellant fails to receive notice of a district court's decision, and the time for filing a Fed. R. App. P. 4(a)(5) motion for an extension of time has expired. *See Vencor Hosps., Inc. v. Standard Life & Acc. Ins. Co.*, 279 F.3d 1306, 1311 (11th Cir. 2002); *Clark v. Lavallie*, 204 F.3d 1038, 1041 (10th Cir. 2000); *Zack v. United States*, 133 F.3d 451, 453 (6th Cir. 1998); *Zimmer St. Louis, Inc. v. Zimmer Co.*, 32 F.3d 357, 361 (8th Cir. 1994). The district court has no discretion to grant an extension beyond the time provided by Fed. R. App. P. 4(a)(5) and 4(a)(6). *Vahan v. Shalala*, 30 F.3d 102, 103 (9th Cir. 1994) (per curiam). Although counsel

cites to Fed. R. Civ. P. 6(b) as giving the district court authority to grant the seventeen-day extension, Fed. R. Civ. P. 6(b) gives the district court discretion to enlarge the time to perform an act required "by these rules or by a notice given thereunder or by order . . . ." However, it is the Federal Rules of Appellate Procedure, not the Federal Rules of Civil Procedure, which prescribes the time period for filing a notice of appeal or motion seeking to enlarge the appeal period. Fed. R. App. P. 26(b)(1) limits enlargement of an appeal period to what is authorized in Fed. R. App. P. 4. The failure of appellant to timely file a notice of appeal deprives an appellate court of jurisdiction. Compliance with Fed. R. App. P. 4(a) is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend. *Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam).

Accordingly, it is ordered that the appeal is dismissed for lack of jurisdiction as it applies to the July 28, 2003 judgment and the September 9, 2003 order. The appeal was timely filed as it applies to the February 10, 2004 ruling.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed SEP 8, 2004]

No. 04-3262

KEITH BOWLES,
Petitioner-Appellant,

v.

HARRY RUSSELL, Warden,
Respondent-Appellee.

ORDER

Keith A. Bowles appeals a district court judgment that denied his habeas corpus petition filed under 28 U.S.C. § 2254. The receipt of his appeal has been construed as an application for a certificate of appealability ("COA") under Fed. R. App. P. 22(b).

To obtain a COA, Bowles must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. . . . When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and

> that jurists of reason would find it debatable wiled-lei the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). Bowles has not met that burden here because his claims are all lacking in substantive merit, barred by an unexcused procedural default, and/or based on issues of state law that do not rise to the level of a constitutional violation.

Therefore, the COA application is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 04-3262

KEITH BOWLES,
Petitioner-Appellant,

vs.

HARRY RUSSELL,
Respondent-Appellee.

MOTION FOR RECONSIDERATION

Now petitioner-appellant, Keith Bowles, and moves that the court reconsider the denial of a certificate of appealability. In an order issued September 8, 2004, the court denied a certificate of appealability. Petitioner requests reconsideration of the denial of a certificate of appealability.

This court, on April 26, 2004, stated that it would review an order of the court dated February 10, 2004. However by denying a certificate of appealability now the court has precluded such an appeal.

The Supreme Court in *Miller-El v. Cockrell*, 123 S.Ct.1029 (2003), the court ruled that to obtain a certificate of appealability a habeas petitioner must show that reasonable jurists could debate whether petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. To issue a certificate of appealability does not require a showing that the appeal will succeed.

Petitioner has presented substantial issues that were not addressed by the District Court. To stated that there are no federal issues presented in this case is to ignore petitioner's claims which are apparent on the face of the record. A

significant issue presented a constitutional claim which was petitioner's claim concerning the jury panel that appeared for petitioner's case which jury panel had been exposed to the trial of a co-defendant. The District Court nor the Magistrate Judge even acknowledged what was stated by this court in *Quintero v. Bell*, 256 F.3d 409 (6th Cir.2001).

In *Quintero* habeas corpus relief was granted to a state prisoner where jurors who sat on the prisoner's trial had previously sat on the trial of a co-defendant several months earlier. The court ruled that this violated the defendant's right to have a trial with impartial and unbiased jurors as guaranteed by the Sixth Amendment. The same rational applies in this case. In addition, there were other infirmities with the trial jurors in this case.

This case was tried after another case involving a shooting committed by Michael Love almost simultaneously and at the same location (Supp.Tr.12, 50, 53-54, 56-57, 94-95). This tainted the entire jury pool. To be impartial jurors must posses a ". . . mental attitude of appropriate indifference, . . ." *United States v. Ward*, 299 U.S.123, 145-46 (1937).

This certainly does not represent a fair and impartial jury. Too may jurors knew of the case in this small community. The court, on its own motion, should have moved the case. In *Irvin v. Dowd*, 366 U.S.717 (1961), the Supreme Court ruled that a jury which included eight person who had expressed opinions as to the defendant's guilt of the crime and which offense had received extensive newspaper, radio and television coverage did not meet the constitutional standard of impartiality:

> With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt form his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental process of the average man. . . . 366 U.S. at 727.

No less is required in this case and defendant is entitled to a new trial. *Sheppard v. Maxwell*, 384 U.S.333 (1966).

There were no black venire persons. Petitioner, who was black, did not have a fair an impartial jury. (Tr.Supp.Tr.86).

Under the Sixth Amendment to the United States Constitution it is provided that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and a public trial, by an impartial jury of the State and District wherein the crime shall have been committed; . . ." A cognate provision of the Ohio Constitution, Section 10 of Article I likewise so provides.

In *Taylor v. Louisiana*, 419 U.S.522 (1975) a court ruled that jury venires must be reasonably representative of the community if this is not so a defendant is denied his right have a jury comprised of a fair cross-section of the community. This has been further refined in the case of *Duran v. Missouri*, 439 U.S.357 (1979).

Petitioner was entitled to have Juror White excused for cause. He was the brother of the Painesville Chief of Police. (Supp.Tr.10, 19-20). Painesville was the place where this happened and was prosecuting this case. Thus, Juror White should have been excused for cause. (Supp.Tr.87-88).

Rule 24(B)(10) of the Ohio Rules of Criminal Procedure provides a challenge for cause of a juror because ". . . he is related by consanguity or affinity within the fifth degree . . . to the person on whose complaint the prosecution was instituted. . . ." Painesville prosecuted this case. Being the Chief's brother would disqualify him. See Ohio Rev.Code § 737.05.

A second compelling issue is the use by the prosecutor concerning the fact that petitioner did not come forward and made a statement to the police.

The Magistrate Judge stated that the prosecution offered evidence that petitioner did not come forward to make a statement for nearly two (2) months after the incident even though he was aware the police were looking for him it was permissible because it is relevant to prove petitioner was attempting to evade the police. This was absolutely incorrect. Even if the police were looking for petitioner, petitioner was not required to make a statement. There was absolutely no relevance to anything in this case other than to bring before the jury that the prosecutor claimed that petitioner was obligated to make a statement and since he did not make a statement that was evidence of his guilt. The analysis by the court was flawed. The Magistrate Judge did not even consider what occurred at the trial and the context in which it occurred at the trial. The prosecutor improperly questioned petitioner when he testified. Later the prosecutor commented on the fact that petitioner did not come forward and voluntarily to make a statement to the police.

Petitioner testified in his own behalf On cross-examination by the prosecutor the petitioner's right not to make a statement and remain silent was infringed. Thus, petitioner was questioned as to whether he went to the police to make a statement. (Tr.321-22). Moreover, the prosecutor asked petitioner: "you never went and told the police about anything that happened, did you?" (Tr.435).

Moreover, in closing argument the prosecutor again alluded to the fact that petitioner did not go to the police and make a statement. (Tr.486). Objections were overruled by the court.

This was wholly unfair and deprived petitioner of a fair trial. In *Milnor v. Black*, 527 F.2d 1 (6th Cir.1975), the defendant in a state criminal prosecution testified in his own behalf. In cross-examination defendant was questioned, without objection, about his failure to tell the police about his alibi. This failure was also alluded to in final argument by the

prosecutor. The court ruled that even in absence of an objection this deprived defendant of a fair trial. See *United States v. Tenorio*, 69 F.3d 1103 (11th Cir.1995).

In *State v. Sabbah*, 13 Ohio App.3d 124, 468 N.E.2d 718 (1982), the defendant was convicted of murder. During trial he was questioned by the prosecutor as to why he had not stated at any point prior to his trial testimony that he had acted in self-defense. The Court of Appeals for Sandusky County ruled that this was prejudicially erroneous.

In *Doyle v. Ohio*, 426 U.S.610 (1976), the Supreme Court ruled that use of a defendant's failure to make a statement after having been advised of his rights it would be constitutional error. This was the same error committed in this case. Petitioner had no need to make a statement. If petitioner was brought into custody and would have to have been advised of his rights and could have declined to make a statement.

Extensive testimony was offered concerning efforts to contact petitioner. This evidence was allowed over defense objection. This in effect, deprived petitioner of a fair trial. Petitioner, even if contacted by the police would have to be advised of his constitutional right not to make a statement. *Miranda v. Arizona*, 384 U.S.436 (1966). This type of evidence cannot be used against petitioner. Thus, allowing the prosecutor to offer evidence concerning attempts to contact petitioner deprived him of a fair trial.

Det. Robert Sayer testified that as a result of his interview with Damon Anderson that he learned other names. He was asked what he did (Tr.319). Sayer testified that he contacted these other parties. He was given and was then asked who he contacted. (Tr.319). Sayer testified that he contacted Richard Hayden and Jamal Russell. There were attempts made to contact petitioner (Tr.320). Thereafter, Sayer related his efforts concerning his efforts to contact petitioner.

Sayer claimed he spoke with a person who identified himself as Keith Bowles. This unknown person told Sayer that he would be in. (Tr.322). Thereafter, Sayer related that he went to Cleveland, stopped at Bowles' home but could not locate him to serve the warrant. Later, after an indictment, a second warrant was issued on September 4, 1998. (Tr.324, 326).

Thereafter, Sayer testified that the FBI became involved because of a fugitive from justice warrant for petitioner. (Tr.329). This evidence was totally irrelevant, prejudicial and denied petitioner a fair trial.

"It is improper 'under the guise of "artful cross-examination" to tell the jury the substance of inadmissible evidence." *United States v. Sanchez*, 176 F.3d 1214, 1222 (9th Cir.1999).

More recently, one court found that this type of questioning to constitute prosecutorial misconduct. It was ineffective assistance of counsel for not objecting to this type of questioning. *Washington v. Houfbauer*, 228 F.3d 689 (6th Cir.2000)

In *Berger v. United States*, 295 U.S. 78 (1935), it was alleged that the prosecuting attorney overstepped the bounds of propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense. The record showed that the prosecuting attorney was guilty of misstating the facts in his cross-examination of witnesses, putting into the mouths of such witnesses things that they had not said; suggesting by his questions that the statements has been made to him personally out of court and pretending to understand that a witness said something which he had not said and persistently cross-examining witnesses upon the basis, assuming prejudicial facts not in evidence, by bullying and arguing with witnesses, and thoroughly conducting himself in an indecorous and improper manner. The court held that this type of conduct deprived one of a fair trial. Even in instances where the trial court did sustain some objections, this would not be enough. 295 U.S. at 85.

Third, the District Court did not acknowledge petitioner's constitutional right to present a defense when the trial court refused to instruct on a lesser included offense.

The right to an instruction to an instruction on a lesser included offense is a component of the right to present a defense guaranteed by the constitution. *Washington v. Texas*, 388 U.S.14 (1967).

An instruction on a lesser included offense was noted by the court as a component of the right to present a defense. *Taylor v. Withrow*, 288 F.3d 846 (6th Cir. 2000).

Petitioner requested that the jury be instructed on assault. The evidence presented by petitioner was that petitioner only hit Ollie Gibson and was in no way responsible for the fatal blows to Ollie Gibson. Ollie Gibson died from wounds that he received from the stomping to his head by Richard T. Hayden. (Tr.244). None of these injuries inflicted by petitioner were fatal or contributed to death.

The prosecutor conceded that petitioner did not kick Gipson in the head. ("it's not represented to any of you that Keith Bowles kicked him in the head. . . ." Tr.514).

In these circumstances petitioner was entitled to an instruction on the lesser included offense of assault. The denial of petitioner's request was improper and prejudicial. (Tr. 466-67).

Petitioner's entitlement to an instruction on assault was decided in *State v. Cochrane*, 151 Ohio St.128, 84 N.E.2d 742 (1949). In *Cochrane* the defendant was indicted for murder in the first degree. The victim died as a result of being hit in the jaw. This caused the decedent to fall against a chair occupied by another patron. After the defendant left the scene the decedent died. At trial the case was submitted to the jury on the charge of first degree murder, second degree murder and manslaughter. The defendant was convicted of second

degree murder and sentenced accordingly. On further appeal to the Ohio Supreme Court, the court ruled that the defendant was entitled to an instruction on the lesser offense of assault and battery:

> If in the trial on an indictment for murder it is possible under the evidence to acquit the defendant of murder in the first degree, of murder in the second degree, and of manslaughter because the evidence fails to establish beyond a reasonable doubt a casual connection between the criminal agency and the cause of death or because the evidence fails to establish any other essential element of such offenses, it is competent for the jury where the evidence warrant it, to find the defendant guilty of assault and battery only and under such circumstances it is error to the prejudice of the defendant to refuse a request to charged on the lesser offense of assault and battery.

The Due Process Clause of the Fourteenth Amendment requires that lesser included offenses be submitted to the jury. This was noted by the Supreme Court in *Hooper v. Evans*, 456 U.S. 605 (1982).

> *Beck v. Alabama*, 447 U.S. 625 (1980), held that the due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction. The jury's discretion is thus channeled so that it may convict a defendant of any crime fairly supported by the evidence, Under Alabama law, the rule in non-capital cases is that a lesser included offense instruction should be given if "there is any reasonable theory from the evidence which would support the position." *Fulghum v. State*, 291 Ala.71, 74, 277 So.2d 886, 890 (1973). The federal rule is that a lesser included offense instruction should be given "if

> the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater." *Keeble v. United States*, 413 U.S. 205, 208, 93 S.Ct. 1193, 1995, 36 L.Ed2d 844 (1973). The Alabama rule clearly does not offend federal constitutional standards, and no reason has been advanced why it should not apply in capital cases. 456 U.S. at 611-12.

Moreover, other courts have held that it is required that an instruction upon a lesser included offense be given. *Brewer v. Overberg*, 524 F.2d 51 (6th Cir. 1980).

It is "beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of a lesser offense and acquit him of the greater." *Keeble v. United States*, 412 U.S. 205, 208 (1973). *See Sansone v. United States*, 380 U.S. 343, 349 (1965).

Lastly, petitioner was denied his constitutional rights when the jury was given an instruction which eliminated the requirement of proof by the prosecution.

> In instructing the jury on aiding and abetting the jury was told that:
>
> Thus, participation in criminal intent may be inferred from the presence, companionship and conduct before and after the offense is committed. (Tr.536). This was improper and unconstitutional.

Such a presumption which foregoes the necessity of proof is unconstitutional, especially where it relieves the state of proving all elements of the offense with evidence beyond a reasonable doubt. *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

The Magistrate Judge, in considering this claim, stated that the presumption given by the trial court was not uncon-

stitutional because of other instructions given. Thus, there was no error. However this was an important component of the instruction.

Although a court is required to consider the entire jury charge, an instruction which relates to the burden of proof and one which relieves the state from proving an element of the offense is subject to special scrutiny. In *Francis v. Franklin*, 471 U.S. 307 (1985), the Supreme Court considered an instruction which stated a presumption. As stated by the court:

> Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. The reviewing court has no way of knowing which of two irreconcilable instructions the jury applied in reaching their verdict. . . . 471 U.S. at 322.

Petitioner therefore requests reconsideration.

/s/ Paul Mancino, Jr.
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SERVICE

A copy of the foregoing *Motion for Reconsideration* was mailed to Bruce D. Horrigan, Assistant Attorney General, Corrections Litigation Section 615 W. Superior Avenue, 11th Floor, Cleveland, Ohio 44113, on this 16th day of September, 2004.

/s/ Paul Mancino, Jr.
PAUL MANCINO, JR. (0015576)
Attorney for Petitioner-Appellant

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed DEC 28, 2004]

No. 04-3262

KEITH BOWLES,
Petitioner-Appellant,

v.

HARRY RUSSELL, Warden,
Respondent-Appellee.

ORDER

Before: MARTIN and MOORE, *Circuit Judges*; BELL, *District Judge*.*

Keith A. Bowles appeals a district court judgment that denied his habeas corpus petition filed under 28 U.S.C. § 2254. He now moves for reconsideration of our court's order that denied his application for a certificate of appealability.

Upon review, we grant a certificate of appealability on the following issues: whether Bowles was denied a fair trial and his constitutional rights under the Fifth, Sixth, and Fourteenth Amendments by the prosecution's questions to him on cross-examination about the fact that he did not make a statement to the police and by the prosecutor's comments regarding his failure to volunteer a statement to the police. See Fed. R. App. P. 40(a). The clerk's office is directed to establish a briefing schedule regarding these issues.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN

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* The Honorable Robert Holmes Bell, United States Chief District Judge for the Western District of Michigan, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed DEC 28, 2005]

No. 04-3262

KEITH BOWLES,
Petitioner - Appellant,

v.

HARRY RUSSELL, Warden,
Respondent - Appellee.

Before: BOGGS, *Chief Judge*; GIBBONS, *Circuit Judge*; and ROSE, *District Judge*.

JUDGMENT

On Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was submitted on briefs without oral argument.

IN CONSIDERATION WHEREOF, it is ORDERED that the appeal from the judgment of the district court is DISMISSED for lack of jurisdiction.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 04-3262

KEITH BOWLES,
Petitioner-Appellant,

v.

HARRY RUSSELL, Warden,
Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 02-01520—Donald C. Nugent, District Judge.

Submitted: October 25, 2005

Decided and Filed: December 28, 2005

Before: BOGGS, Chief Judge; GIBBONS, Circuit Judge; and ROSE, District Judge.*

COUNSEL

ON BRIEF: Paul Mancino, Jr., MANCINO, MANCINO MANCINO, Cleveland, Ohio, for Appellant. Bruce D. Horrigan, CORRECTIONS LITIGATION SECTION, Cleveland, Ohio, for Appellee.

OPINION

BOGGS, Chief Judge. This is a case about missed deadlines. At times, they go unnoticed, but sometimes the lapse is fatal. This case presents one of the fatal variety. Petitioner Keith Bowles failed to receive timely notice of the district

* The Honorable Thomas M. Rose, United States District Judge for the Southern District of Ohio, sitting by designation.

court's ruling that triggered his appeal period. When he did receive notice, he correctly sought relief under Fed. R. App. P. 4(a). When the district court granted his requested relief but mistakenly offered an erroneous deadline, Bowles chose it and failed to comply with the deadline of February 24, 2004. This court on motion declined to dismiss his appeal. Today, we correct that error and hold that the fourteen-day period of Rule 4(a)(6) of the Federal Rules of Appellate Procedure is not susceptible to extension through mistake, courtesy, or grace.

I

On August 22, 1998, Keith Bowles, Richard Hayden, Damon Anderson, and Jamal Russell drove from Cleveland to Fairport Harbor, Ohio to see a performance at a bar called Hellbusters. The group left the bar early in the morning and drove to nearby Painesville to attend an after-hours party at the Argonne Arms apartment complex. On their way to the party, they passed a bar called Nino's, outside of which they saw Hayden's cousin, Marcus Moore, in some physical distress. Later, after rendezvousing with Moore, they learned from him that he had been jumped and beaten by a group of men from Painesville including Antonio Rymmer.

Bowles, Hayden, Anderson, and Russell agreed to search for Rymmer at the Argonne Arms and extract their revenge. When they found Rymmer, and he was armed, the group decided to delay their plan. Soon after, the group happened upon the victim, Ollie Gipson. Gipson appeared as if he might be armed and, when it became clear that he was not, Bowles, Hayden, and Anderson beat him. The final, deadly, blows were administered by Hayden after Bowles had returned to the car. Gipson died the next day as a result of his injuries. Bowles was indicted on September 4, 1998, for his part in the beating on a charge of felonious assault in violation of Ohio Revised Code § 2903.11, and murder in violation of § 2903.02(B).

In the trial court, Bowles moved for dismissal, arguing that Ohio's Revised Code had created two categories of murder in contravention of the Fourteenth Amendment. *See* U.S. Const. amend. XIV. The court denied the motion and held that the Supreme Court has never held unconstitutional the individual states' ability to enact felony-murder statutes. *See Lockett v. Ohio*, 438 U.S. 586, 602 (1978) (holding "[t]hat states have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony-murder statutes is beyond constitutional challenge"). On March 3, 1999, an Ohio jury entered a verdict of guilty on a single count of murder and sentenced Bowles to serve an indefinite term of imprisonment of fifteen years to life in an Ohio correctional facility.

Bowles appealed his case to both the Court of Appeals and Supreme Court of Ohio. Both denied him relief. *See Ohio v. Bowles*, No. 99-L-075, 2001 WL 502042 (Ohio Ct. App. May 11, 2001). The one-year statue of limitations for federal habeas began running when the ninety-day certiorari period ended. *See Abela v. Martin*, 348 F.3d 164, 172 (6th Cir. 2003); 28 U.S.C. § 2244(d)(1) (allowing a one-year statute of limitations on filing from the day a state conviction becomes final).

On September 5, 2002, Bowles filed his federal petition for a writ of habeas corpus. The case was referred to a magistrate judge, who, on May 23, 2003, issued a report and recommendation that the petition be denied. Bowles filed a lengthy objection to the magistrate judge's report, but United States District Judge Nugent, on July 10, 2003, adopted the findings in a short memorandum opinion, additionally denying the petitioner a certificate of appealability pursuant to 28 U.S.C. § 2253(c). The order was docketed on July 28, 2003.

On August 6, 2003, Bowles moved for a new trial under Rule 59 or to amend the judgment under Rule 52, objecting to the adoption of the magistrate judge's report without, he

argued, de novo review of the findings. *See* Fed. R. Civ. P. 52, 59. The motion was denied on September 9, 2003, the date of the final, appealable order in this case. Accordingly, a timely notice of appeal would have been entered, at the latest, by October 9. *See* Fed. R. App. P. 4(a)(1)(A) (giving thirty days to appeal a final judgment). However, instead of filing his notice, Bowles, remained silent for ninety-four days. All possible avenues of appeal closed during this period, save one. Only Fed. R. App. P. 4(a)(6) allows a party to timely file a notice of appeal ninety-four days after judgment. See Fed. R. App. P. 4(a)(1) (requiring a notice of appeal to be filed within thirty days of judgment); Fed. R. App. P. 4(a)(4) (granting thirty days for appeal after the disposal of some motions including those under Fed. R. Civ. P. 59); Fed R. App. P. 4(a)(5) (extending time an additional thirty days for "excusable neglect or good cause").

On December 12, 2003, Bowles moved to reopen the appeal period pursuant to Rule 4(a)(6) of the Federal Rules of Appellate Procedure. Bowles claimed that the order of September 9, in contravention of the Rules, was never served by the court and that he was unaware of the order until December 3, 2003, when he obtained a docket sheet. *See* Fed. R. Civ. P. 77(d) (directing that "[i]mmediately upon the entry of an order or judgment the clerk shall serve a notice"). The parties do not dispute the lack of notice, but Bowles blames the error on the court while the Warden claims that Bowles was at fault for failing to comply with the requirements imposed by electronic filing. Regardless, Bowles's contention apparently had merit—the district court granted his motion on February 10, 2004. At this point, the district court inexplicably erred in miscalculating and then stating the cut-off date for the notice of appeal. In its marginal order, citing Rule 4(a)(6), the court denied the motion to vacate but granted the motion to reopen, giving Bowles until February 27 to file his notice of appeal. By its explicit terms, the Rule allows for only a fourteen-day extension. A timely appeal thus was

required to have been filed by February 24. However, Bowles filed his notice of appeal on February 26, timely under the judge's order, but clearly not in compliance with the Rule.

On March 10, 2004, this court issued a show-cause order, questioning the late filing of the appeal. Bowles filed a response and on April 26, 2004, a motions panel of this court discharged the show-cause order and dismissed the appeal for lack of jurisdiction "as it applies to the July 28, 2004 judgment and the September 9, 2003, order." But, the order continued, "[t]he appeal was timely filed as it applies to the February 10, 2004 ruling." On September 8, 2004, construing the appeal as an application for a certificate of appealability under Fed. R. App. P. 22(b), this court denied a certificate of appealability and Bowles promptly petitioned for a rehearing. His motion for reconsideration was entirely concerned with the merits of his habeas petition denied by the district court. On December 28, 2004, perhaps unaware of the procedural disposition of the appeal, a different motions panel of this court granted Bowles's motion for reconsideration and granted in part and denied in part a certificate of appealability on some of the constitutional issues of the case. The order, which makes no mention of timeliness, states:

> [W]e grant a certificate of appealability on the following issues: whether Bowles was denied a fair trial and his constitutional rights under the Fifth, Sixth, and Fourteenth Amendments by the prosecution's questions to him on cross-examination about the fact that he did not make a statement to the police and by the prosecutor's comments regarding his failure to volunteer a statement to the police.

II

A

Respondent Warden argues that lack of subject matter jurisdiction prevents us from hearing the merits of this appeal

and that the jurisdictional scope of this appeal should be limited to the marginal order of February 10, 2004, reopening the time for filing an appeal. Petitioner does not offer any argument relating to the jurisdictional problem presented. However, even if the respondent had overlooked this issue, the Federal Rules of Civil Procedure make it incumbent upon this court to dismiss any action when it appears that the court lacks jurisdiction. Fed. R. Civ. P. 12(h)(3); *Janis v. Ashcroft*, 348 F.3d 491, 493 (6th Cir. 2003).[1] *See also Friends of*

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[1] The Supreme Court has recently distinguished between rules that govern subject-matter jurisdiction and those that are "inflexible claim-processing" rules. *See Eberhart v. United States*, 126 S. Ct. 403 (2005) (per curiam); *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004). For two reasons, we believe this distinction is not applicable to the case at bar. First, in *Kontrick*, the Court found that "[n]o statute, however, specifies a time limit for filing a complaint objecting to the debtor's discharge. Instead, the controlling time prescriptions are contained in the Federal Rules of Bankruptcy Procedure, specifically, Rules 4004(a) and (b) and 9006(b)(3)." 540 U.S. at 448. Second, the petitioner in *Kontrick*, in answering the untimely complaint, never addressed the issue of untimeliness, and thus forfeited the right to rely on the time limits in the Federal Rules of Bankruptcy Procedure. *Id.* at 459-60 ("No reasonable construction of complaint-processing rules, in sum, would allow a litigant situated as Kontrick is to defeat a claim, as filed too late, after the party has litigated and lost the case on the merits").

Similarly, in *Eberhart*, the government opposed the defendant's motion on the merits, ignoring the timeliness problem. Thus, "where the Government failed to raise a defense of untimeliness until after the District Court had reached the merits, it forfeited that defense." 126 S. Ct. at 407. Nor does the court in *Eberhart* identify a specific statute from which Rule 33 could be said to contain an element of subject-matter jurisdiction. *See Kontrick*, 540 U.S. at 453 ("Only Congress may determine a lower federal court's subject-matter jurisdiction.").

In both these ways, the case at bar is distinguishable. The government, did not, nor did it need to, oppose Bowles's Rule 4(a)(6) motion in the district court. Instead, it objected to the timeliness of the appeal in its brief. *See* Br. of Resp't at 1 ("This Court lacks jurisdiction to hear this appeal"). And, in contrast to the situation in *Kontrick*, Congress *has* limited our jurisdiction in the Act of December 9, 1991, Pub. L. 102-198,

Crystal River v. EPA, 35 F.3d 1073, 1077-78 (6th Cir. 1994) (applying de novo review to questions of subject matter jurisdiction).

B

The Federal Rules of Appellate Procedure define the applicable deadlines in the courts of appeals. Fed. R. App. P. 1(a)(1); *see* 28 U.S.C. § 2071 (rules are consistent with acts of Congress). *See also* 28 U.S.C. § 2072(b) ("rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."). When properly informed of the judgment, a party has thirty days to file a notice of appeal. Fed. R. App. P. 4(a)(1)(A). A limited extension of the time to file may also be granted upon a party's motion under Rule 4(a)(5). *See Zack v. United States*, 133 F.3d 451, 453 (6th Cir. 1998). Where, as in this case, a party claims that he failed to receive notice of a judgment, Rule 4(a)(6) allows the district court to extend the time afforded to file a notice of appeal:

> (6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal *for a period of 14 days after the date when its order to reopen is entered*, but only if all the following conditions are satisfied:
>
> > (A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;

---

§ 12, 105 Stat. 1623, 1627 (codified at 28 U.S.C. § 2107) ("the district court may . . . reopen the time for appeal for a period of 14 days . . . ."). For these reasons, we think that Rule 4(a)(6) is, in fact, "a prescription[] delineating the classes of cases" that we may hear. 540 U.S. at 455. In addition, the respondent, by objecting in his brief to this court, never forfeited his right to strict adherence to Rule 4.

> (B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and
>
> (C) the court finds that no party would be prejudiced.

Fed. R. App. P. 4(a)(6) (emphasis added)[2]; 28 U.S.C. § 2107. The Appellate Rules underscore the exclusivity of the 4(a)(6) remedy by explicitly excluding it from the blanket Rule regarding extension of other appellate time prescriptions, "For good cause, the court may extend the time prescribed by these rules. . . . [b]ut the court may not extend the time to file a notice of appeal (except as authorized in Rule 4)." Fed. R. App. P. 26(b); *see Rhoden v. Campbell*, 153 F.3d 773, 774 (6th Cir. 1998).

Petitioner moved to reopen pursuant to Rule 4 (a)(6) on December 12, 2003. In accordance with the Rules, the motion was filed within seven days of December 5, the date on which petitioner received notice of the final judgment. This is also earlier than 180 days after the judgment, March 7, 2004. Finally, December 5 is not within 21 days of the entry of judgment, September 9. On February 10, 2004, the motion was granted and a marginal order reopened the period for appeal, extending it until February 27, 2004. However, according to the Rule, the new appeal period can only extend fourteen days after the date when the order is entered. Since the order was entered on the 10th, the Rule's outermost deadline would have been February 24. *See* Fed. R. App. P. 26(a) (computing time). Petitioner filed his notice of appeal on February 26, 2004, inside of the deadline stated in the order, but outside of the Rule's deadline.

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[2] The rule was amended, effective December 1, 2005. The change requires that notice be pursuant to Fed. R. Civ. P. 77(d) but otherwise the substance of the rule remains the same.

III

A

Rule 4(a) has been interpreted as both mandatory and jurisdictional by the Supreme Court and this Circuit. *See Browder v. Dir., Dept. of Corrs. of Illinois*, 434 U.S. 257, 264 (1978); *In re Sulzer Orthopedics & Knee Prosthesis Prods. Liab. Litig.*, 399 F.3d 816, 817 (6th Cir. 2005); *Peake v. First Nat. Bank and Trust Co. of Marquette*, 717 F.2d 1016, 1018 (6th Cir. 1983); *Oja v. Dep't of Army*, 405 F.3d 1349, 1358 (Fed. Cir. 2005) (noting that it is "beyond cavil" that 4(a)(6) is mandatory and jurisdictional).

Other circuits have described Rule 4(a)(6)'s limited opportunity to reopen the time for appeal as one that "balances the inequity of foreclosing appeals by parties who do not receive actual notice of a dispositive order against the need to protect the finality of judgments," *See Vencor Hosp., Inc. v. Standard Life and Acc. Ins. Co.*, 279 F.3d 1306, 1309 (11th Cir. 2002) (describing the Rule as limited and exclusive).

> According to the Notes of the Advisory Committee on Appellate Rules, the purpose of the 1991 amendment was to provide "a limited opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk pursuant to [Fed. R. Civ P. 77(d)], is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal"

Zimmer St. Louis, Inc. v. Zimmer Co., 32 F.3d 357, 360 (8th Cir. 1994). *See also In re Stein*, 197 F.3d 421, 425 (9th Cir. 1999) (quoting identical language). The Tenth Circuit has found that "the essence" of the Rule is "finality of judgment." *Clark v. Lavallie*, 204 F.3d 1038, 1041 (10th Cir. 2000). The *Clark* court, like the other circuits to have considered the issue, found the 180-day limitation in the Rule to be "specific and unequivocal" *Id.* at 1040. *See Vencor*, 279 F.3d at 1311;

Servants of the Paraclete v. Does I-XVI, 204 F.3d 1005, 1010 (10th Cir. 2000); *see also* 16A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 3d § 3950.6 at 228 (1999) ("Rule 4(a)(6) provides the exclusive means for extending appeal time for failure to learn that judgment has been entered. Once the 180-day period has expired, a district court cannot rely on the one-time practice of vacating the judgment and reentering the same judgment in order to create a new appeal period"). "While application of that concept infrequently may work misfortune, it is an overriding principle which demands enforcement." *Clark*, 204 F.3d at 1041. "Moreover, nothing within Rule 4(a)(6) indicates it is permissive or that its limitations may be waived for equitable reasons." *Id.* at 1040 (referring specifically to the 180-day limit).

B

Counseling a contrary and more liberal interpretation of the Rule is a line of Supreme Court cases employing an equitable interpretation of appeals time limits, starting with *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam). In *Harris*, the judgment of the trial court became final while the lead member of the litigation team was on vacation in Mexico. *Id.* at 215-16. The trial counsel in the United States was without direction about whether or not an appeal should be filed, so he moved for an extension to the regular thirty-day limit for filing a notice of appeal pursuant to then Fed. R Civ. P. 73(a), now Fed. R. App. P. 4(a)(5)(A)(ii), allowing an extension where "that party shows either excusable neglect or good cause." *Id.* at 216. The motion was granted, an extra two weeks prescribed, and the notice of appeal was timely filed. *Ibid.* On appeal, however, the Seventh Circuit held that the movant had not met the statutory standard under Rule 73 for "excusable neglect based on a failure of a party to learn of the entry of the judgment," and that jurisdiction was thus lacking. *Harris Truck Lines,*

Inc. v. Cherry Meat Packers, Inc., 303 F.2d 609, 611 (7th Cir. 1962) (quoting FED. R. CIV. P. 73(a)). The Supreme Court reversed, noting the "obvious great hardship to a party who relies upon the trial judge's finding," and held that these decisions should be given "great deference." 371 U.S. at 217. *Harris's* closing language contains a phrase that has come to identify this line of cases: "Whatever the proper result as an initial matter on the facts here, the record contains a showing of *unique circumstances* sufficient that the Court of Appeals ought not to have disturbed the motion judge's ruling." *Ibid.* (emphasis added). Thus, in *Harris*, all action was within the relevant time limits. The only quarrel was over the effect of a possibly mistaken substantive ruling on which counsel relied.

Harris was soon followed by *Thompson v. INS*, 375 U.S. 384 (1964) (per curiam). In *Thompson*, the trial court explicitly accepted, and the government did not object to, the timeliness of a motion for a new trial that was actually two days late. *Id.* at 386. The motion was denied and a notice of appeal was filed that was timely with respect to the most recent motion, but not as to the original judgment. *Ibid.* The court of appeals dismissed the notice as untimely. *Thompson v. INS*, 318 F.2d 681, 684 (7th Cir. 1963); 375 U.S. at 385. The Supreme Court, however, relying on *Harris, supra*, reversed:

> The instant cause fits squarely within the letter and spirit of *Harris*. Here, as there, petitioner *did an act which, if properly done, postponed the deadline* for the filing of his appeal. Here, as there, the District Court concluded that the act had been properly done. Here, as there, the petitioner relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline. And here, as there, the Court of Appeals concluded that the District Court had erred and dismissed the appeal. Accordingly, in view of

> these 'unique circumstances,' we . . . remand the case to . . . be heard on the merits.

Thompson, 375 U.S. at 387 (quoting *Harris*, 371 U.S. at 217) (emphasis added, citation omitted). Four justices dissented in *Thompson*, finding that it was not analogous to *Harris*. Speaking through Justice Clark, they noted that the court in *Thompson*, unlike the court in *Harris* "had no jurisdiction to pass upon the untimely motions," ten days having already elapsed. *Id.* at 389. Further, they accused the majority of extending *Harris* into a context where "excusable neglect" is neither mentioned nor alleged, making the standard of "unique circumstances" meaningless. *Ibid. Accord, Wolfsohn v. Hankin*, 376 U.S. 203 (1964) (per curiam) (extending time to move for a rehearing where extension was granted within the statutory deadline).

The most recent, and only subsequent, decision to discuss *Thompson* is *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989). There, the court held that a postjudgment motion for prejudgment interest is a motion under FED. R. CIV. P. 59 to alter or amend the judgment, and that it operates with Fed. R. App. P. 4(a)(4) to vitiate any notice of appeal filed while the motion is pending. *Id.* at 177. Even though the litigants claimed that the district court had led them to believe that their notice of appeal, made during the pendency of their Rule 59 motion, as timely, the Court refused to apply Thompson to reverse the court of appeals. *Ibid.* The Court made two important statements. First, it stated that *Thompson* required an "affirmative[] represent[ation]" by the district court. *Id.* at 178. Second, it severely limited *Thompson* and stated that *Thompson*, "applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his, appeal and has received specific assurance by a judicial officer that this act has been properly done." *Ibid.*

This court has recognize the "unique circumstances" doctrine of *Thompson*. *See, e.g., Lawrence v. The Teamsters*, 320

F.2d 590, 593 (6th Cir. 2003) (excluding court clerks and limiting reliance to statements by judges); *Birrell v. Browns*, 867 F.2d 956, 957 (6th Cir. 1989) (allowing extension of appeal period before 1991 amendment to Fed. R. App. P. 4). Yet, it appears that this specific fact situation has not been considered by this, or any other, circuit.

C

In comparing this case to the available precedents, we note that the circumstances here fall outside of the test formulated in *Osterneck*, that *Thompson* applies "only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by judicial officer that this act has been properly done." *Osterneck's*, 489 U.S. at 170. As in *Osteneck's*, "that is not the case here." *Ibid.* First, petitioner's act did not attempt to postpone a deadline for filing his appeal; it was to move for a reopening of the appeal period so that he might file his untimely notice of appeal. Second, it was, in fact, the district court here that performed the improper act and purported to extend the filing date beyond what was permitted by the Rule. Clearly the district court is not a party. Additionally, the chronological order of the actions is distinct from those in *Osterneck*. The rule in that case requires that judicial assurances follow the actions of the party. Here, in contrast, the judicial assurance precedes the party's act. Finally, petitioner receive no assurances from the district court that his notice of appeal was timely. Nor, as we explain below, did this court provide any meaningful assurance that the notice, with regard to any of the merits in the case, /was timely. We believe that *Osterneck's* language to limit the reach of Thompson is applicable in this case. If Thompson is, in fact, a doctrine of "unique circumstances," then it does not apply to the case at bar.

Additionally, considering policy, the *Harris* line of cases operates to excuse neglect on the part of the litigant, not on

the part of the court. They are concerned with the unfairness and "obvious great hardship" of an appeals court reversing a trial courts decision to accept the negligent acts of a litigant, not with the negligent acts of the court itself. *Harris*, 371 U.S. at 217. They are therefore distinguishable through both their facts and the polices they promote. All these cases predate the 1991 amendments to the Rules of Appellate Procedure which, we believe, further undermine any argument for their liberal application in this situation. Bowles's situation is clearly contemplated and treated by the 1991 addition of Rule 4(a)(6). In the words of the Advisory Committee:

> The amendment provides a limited opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk of the district court . . . is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal. The amendment adds a new subdivision (6) allowing a district court to reopen for a brief period the time for appeal upon a finding that notice of entry of a judgment or order was not received from the clerk or a party within 21 days of its entry and that no party would be prejudiced.

Advisory Committee Note to 1991 Amendment to Fed. R. App. P. 4.

We believe that the truly relevant cases are those like *Clark* and *Zimmer*—and that the fourteen-day period in Rule 4(a)(6) should be treated as strictly as the 180-day period in that same Rule. The "limited opportunity for relief" contemplate by the Rule includes both enumerated periods. Our concerns for finality and economy and the Rule's historical function of relieving unfairness in a single factual situation by providing a set method of relief support this holding. As outer limits, the fourteen-day and 180-day periods are analogous. As one commentator noted, "The new paragraph (6) is explicit on the [14-day] point." David D. Siegel, *The Recent (Dec. 1, 1991,*

Changes in the Federal Rules of Civil Procedure, 142 F.R.D. 359, 379 (1992).

IV

As a final matter, we must determine whether the doctrine of the law of the case, and the history of this litigation prevent us from recognizing the jurisdictional defect and thus require us to consider the merits. As the history above makes clear, there has been a substantial amount of activity in the court of appeals that could support the petitioner's view that the merits are properly before us. However, as we discuss below, this court has never held that jurisdiction is proper in this case. Rather, when the issue of jurisdiction has been properly before us, we have consistently found it to be lacking.

The law of the case, like issue reclusion, or collateral estoppel, prevents the relitigation of an issue once there has been a judgment on the Merits. Later disputes concerning that issue are considered foreclosed in any subsequent suit.

> The doctrine of the law of the case is similar in that it limits relitigation of an issue once it has been decided, but the law of the case doctrine is concerned with the extent to which the law applied in decisions at various stages of the same litigation becomes the governing principle in later stages.

18 Moore's Federal Practice, § 134.20 (Matthew Bender 3d ed.). "The gist of the [law of the case] doctrine is that once an appellate court either expressly or by necessary implication decides an issue, the decision will be binding upon all subsequent proceedings in the same case." *Int'l Union of Operating Eng'rs, Local Union 103 v. Indiana Const. Corp.*, 13 F.3d 253, 256 (7th Cir. 1994) (quoting *Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir.1991)); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988). "The law of the case doctrine generally discourages courts from reconsidering determinations that the court made in an earlier stage of the

proceeding" *United States v. Graham*, 327 F.2d 460, 464 (6th Cir. 2003)

Further, the doctrine applies only to issues that have been decided explicitly (or by necessary implication) by a court. *Ibid.* A court need not elucidate or explain its decision, but it must "decide[] upon a rule of law." *Christianson*, 486 U.S. at 817; *Schiro v. Farley*, 510 U.S. 222, 232 (1994) (applying preclusive effect where issue was " determined by a valid and final judgment") (emphasis added); *Rouse v. Daimler-Chrysler Corp.*, 300 F.3d 711, 715 (6th Cir. 2002) (finding an abuse of discretion where law of the case was applied and, after "careful review," the issue was never actually decided below); *In re Big Rivers Elec. Corp.*, 355 F.3d 415, 442 (6th Cir. 2004) (noting that a decision of a court requires an order); *accord Amelkin v. McClure*, 330 F.3d 822, 828-29 (6th Cir. 2003). Finally, "we recognize that the law of the case doctrine is discretionary when applied to a coordinate court or the same court's own decisions." *Bowling v. Pfizer, Inc*, 122 F.3d 1147, 1150 (6th Cir. 1998) (citing *United States v. Todd*, 920 F.2d 399, 402 (6th Cir.1990)); *See Christianson*, 486 U.S. at 817 (acknowledging the limits of the doctrine in situations of clearly erroneous rulings); *In re Kenneth Allen Knight Trust*, 203 F.3d 671, 677-78 (6th Cir. 2002) (doctrine is discretionary when a court reviews its prior erroneous decision); *Perillo v. Johnson*, 205 F.3d 775, 780-81 (5th Cir. 2000) (doctrine is a matter of judicial discretion rather than judicial power when a court is reviewing its own prior decision).

Accordingly, we look to the prior decisions and orders of this court to determine if the issue of jurisdiction was actually decided in a final judgment. Only the order of April 26, 2004, addresses the issue of petitioner's untimely notice of appeal. That order is almost entirely devoid of any language even suggesting a decision of this court that jurisdiction for this appeal should be sustained. Only the last sentence, discussed

below, could support a positive outcome for the petitioner. The entire discussion of the order supports its conclusion that the appeal be dismissed. Specifically, the appeal is dismissed as it relates to the judgment of July 28 and the order of September 9, 2003. Quizzically, however, the order continues to state, in its last sentence, that the appeal is timely as to the February 10, 2004, ruling.

However, the only appeal/able issues decided in the court below were the judgment to deny the granting of the writ, and the denial of petitioner's motion to reconsider that judgment. The April 26, 2004, order of our court explicitly states that there is no jurisdiction with respect to those issues. It isolates the February 10 ruling extending time to appeal as the sole appealable issue that this court can hear. Yet, when the merits adjudication is removed from the set of appealable issues, a complete absence of subject matter remains. Additionally, why would, 9r could, the petitioner appeal the February order when its outcome was favorable to him? We leave this question unanswered. We hold that the final sentence in the April 26 order was surplusage, that it added no meaning to the order and, therefore, it cannot be construed as a decision of this court. Because this court has not made any decision that is contrary to our ruling today, and because the doctrine of the law of the case is prudential and not jurisdictional, we hold that since the April order is, where explicable, consistent with our reasoning today, the doctrine of the law of the case is not upset in any cognizable way.

V

We therefore hold that this court is without jurisdiction to consider Bowles's appeal. Accordingly, this appeal is DISMISSED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed APR 21, 2006]

No. 04-3262

KEITH BOWLES,
Petitioner-Appellant,

v.

HARRY RUSSELL, Warden,
Respondent-Appellee.

BEFORE: BOGGS, Chief Judge; GIBBONS, *Circuit Judge*; and ROSE,* *District Judge*.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN, Clerk

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* Hon. Thomas M. Rose, United States District Judge for the Southern District of Ohio, sitting by designation.

(2)

No. 06-5306

FILED
JAN 19 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

KEITH BOWLES,

Petitioner,

v.

HARRY RUSSELL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether an appellate court may *sua sponte* dismiss an appeal which has been filed withing the time limitations authorized by a district court after granting a motion to reopen the appeal time under Rule 4(a)(6) of the Federal Rules of Appellate Procedure.

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IN THE

Supreme Court of the United States

No. 06-5306

KEITH BOWLES,

Petitioner,

v.

HARRY RUSSELL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The United States Court of Appeals for the Sixth Circuit (Sixth Circuit) issued a published opinion which is reported at 432 F 3d 668 (6th Cir 2005). The Sixth Circuit also issued a series of unpublished orders which are reproduced in the Joint Appendix.

The United States District Court for the Northern District of Ohio (District Court) did not issue a published opinion. The relevant District Court judgments and orders are reproduced in the Joint Appendix.

JURISDICTION

The Sixth Circuit filed its opinion and a concurrent judgment dismissing the appeal for lack of jurisdiction on

December 28, 2005. Petitioner timely filed a petition for a rehearing and a suggestion for a rehearing en banc. On April 21, 2006, the Sixth Circuit denied the petition for a rehearing and rehearing en banc. Petitioner filed his petition for writ of certiorari July 14, 2006. The statutory provision conferring jurisdiction is 28 U.S.C § 1257.

The United States Supreme Court, on December, 7, 2006, granted petitioner's writ of certiorari to review the judgment of the Sixth Circuit.

RULES OF APPELLATE AND CIVIL PROCEDURE INVOLVED

RULE 1(a)(2) of the Federal Rules of Appellate Procedure

(a) Scope of Rules.

* * *

(2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

RULE 4(a)(6) of the Federal Rules of Appellate Procedure

(a) Appeal in a Civil Case

* * *

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the

moving party received notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

Rule 26(b)(1) of the Federal Rules of Appellate Procedure

(b) Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires But the court may not extend the time to file:

(1) a notice of appeal (except as authorized In Rule 4) or a petition for permission to appeal;

RULE 6(b) of the Federal Rules of Civil Procedure

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(B), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

STATEMENT OF THE CASE

Petitioner Keith Bowles, instituted this action seeking a writ of habeas corpus with respect to the judgment and sentence entered by the Court of Common Pleas of Lake County, Ohio. Petitioner was convicted of murder and sentenced to a term of imprisonment of fifteen (15) years to

life. His petition was filed on August 5, 2002 Respondent filed a return of writ on October 24, 2002 (Jt. App. 14-58).

Petitioner thereafter filed his traverse to the return of writ and his brief on December 2, 2002 (Jt. App. 59-88).

The Magistrate Judge, on May 23, 2003, issued a report and recommendation recommending that the petition be denied. Petitioner filed his objections and exceptions to the report and recommendation of the Magistrate Judge on June 27, 2003 Respondent filed a response in opposition to petitioner's objections on July 10, 2003. (Jt. App. 89-137).

On the same day, July 10, 2003, the District Court filed its memorandum and opinion adopting the Magistrate Judge's report and recommendation together with a concurrent judgment entry dismissing the petition for writ of habeas corpus (Jt. App. 140-42).

On August 6, 2003, Petitioner filed a motion for a new trial, or in the alternative, to alter and amend judgment. The District Court denied the motion on September 9, 2003. Significantly, however, neither the District Court nor the clerk served the order on either petitioner or his attorney. After learning of the District Court's ruling, Petitioner, on December 12, 2003, filed a motion to vacate and to reopen the time for an appeal. The District Court, on February 10, 2004, granted Petitioner's motion to reopen the appeal time by February 27, 2004. Petitioner, on February 26, 2004, filed his notice of appeal (Jt. App. 145-53).

On March 10, 2004, the Sixth Circuit filed an order ordering Petitioner to show cause in writing, not later than twenty (20) days from the date of the order, why his appeal should not be dismissed for lack of jurisdiction. Petitioner timely responded to this order (Jt. App. 154-58).

On April 26, 2004, a panel of the Sixth Circuit reviewed Petitioner's response to the order to show cause why the case

should not be dismissed for lack of jurisdiction because of a claimed late notice of appeal. A panel of the Sixth Circuit ruled that the appeal should be dismissed for lack of jurisdiction only as it applied to the July 28, 2003 judgment and the September 9, 2003 order of the District Court denying Petitioner's motion for a new trial or alter and amend judgment. The Sixth Circuit further ruled that Petitioner's notice of appeal was timely as to the February 10, 2004 order of the District Court. (Jt. App. 159-61).

On September 8, 2004, another Sixth Circuit panel filed an order denying Petitioner a certificate of appealability. Petitioner thereafter filed a motion for reconsideration setting forth his constitutional claims he wished to present in his appeal (Jt. App. 162-73).

On December 28, 2004, a different Sixth Circuit panel granted a certificate of appealability for the following issues:

> [W]hether Bowles was denied a fair trial and his constitutional rights under the Fifth, Sixth and Fourteenth Amendments by the prosecution's questions to him on cross-examination about the fact that he did not make a statement to the police and by the prosecutor's comments regarding his failure to volunteer a statement to the police. . . . (Jt. App.174).

Another Sixth Circuit panel, on December 28, 2005, dismissed the appeal ruling that Petitioner did not file a timely notice of appeal within the fourteen (14) day period of Rule 4(a)(6) of the Federal Rules of Appellate Procedure even though Petitioner's notice of appeal was filed timely in accordance with the extension of time granted by the District Court. Petitioner sought a rehearing en banc or a rehearing from the original Sixth Circuit panel. The motion was denied on April 21, 2006 (Jt. App. 175-193a).

Petitioner filed his petition for writ of certiorari on July 14, 2006. The petition for writ of certiorari was allowed by this Court on December 7, 2006.

SUMMARY OF ARGUMENT

The issue in this case is whether Petitioner, reasonably relying upon the District Court's reopening the appeal time to February 27, 2004, three days beyond the 14-day period prescribed by Rule 4(a)(6), deprived the Sixth Circuit of Appeals of Jurisdiction. Petitioner, in accordance with the District Court's grant of additional time, filed his notice of appeal on February 26, 2004.

After the case had been briefed on the merits, the Sixth Circuit ruled that it was without jurisdiction because the District Court did not have authority to grant more than fourteen (14) days to file a notice of appeal after granting a Rule 4(a)(6) motion to reopen the appeal.

This issue should have been resolved as a "claim-processing" issue rather than a jurisdictional issue. As noted, Respondent filed no objection to Petitioner's motion to reopen the appeal. Respondent did not even reference any jurisdictional Issue until he inserted two sentences in his merit brief filed in the Sixth Circuit.

This case presents one of those unique circumstances where a party has relied on an order of the court and performed the requested act within the time limitations set by the court. No timely objection was registered by Respondent to the District Court's rulings until some thirteen (13) months later. Any claimed jurisdictional objection thus would be deemed forfeited or waived at that point.

Whether Respondent's silence is deemed a "waiver" or "forfeiture," Petitioner's appeal should not have been dismissed in summary fashion. Although this precise issue may not have been decided by this Court, this Court in similar cases has ruled that even arguably untimely filings did not deprive the appellate court of jurisdiction. Completely overlooked in the analysis by the Sixth Circuit, in dismissing Petitioner's appeal, was that Respondent did not timely object

to the action or order of the District Court. In the words of Chief Justice Roberts:

> Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike. . . . *Martin v. Franklin Capital Corp.*, 126 S Ct 704, 710 (2005).

Petitioner has presented four (4) reasons why the ruling by the Sixth Circuit was in error. First, if properly viewed, Rule 4(a)(6) of the Federal Rules of Appellate Procedure is a "claim-processing" rule. So viewed, the party adversely affected, in this case Respondent, would be required to timely object to any order of the court Because there was no objection by Respondent until Respondent filed his brief in the Sixth Circuit some thirteen (13) months later, any objection would be forfeited by that time. This is in accordance with pronouncements by this Court in *Eberhart v. United States*, 126 S Ct 403 (2005) and *Kontrick v. Ryan*, 540 U S 443 (2004), where the litigants' untimely filed motions or pleadings with the court. In both of those cases, the opposing party failed to timely object. Because of this, this Court ruled that this delinquency constituted a waiver of forfeiture.

A second reason is that this case presents a set of "unique circumstances." Petitioner reasonably relied upon a court order which seta specific date by which Petitioner was to file his appeal. Petitioner complied with the court order. Thus, this presented circumstances similar to those in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U S 215 (1962) and *Thompson v. INS*, 375 U S 384 (1964).

In each of those cases litigants relied upon a directive from the court and complied with the directive from the court. Even though it was later determined that the court was in error in granting the requested authorization, reasonable reliance on those court orders allowed the case to proceed. This

was because the affected party had received a specific assurance by a judicial officer that the act had been properly done.

Petitioner, in a similar predicament, applied to the District Court to reopen his appeal time. The District Court ruled that Petitioner's motion to reopen his appeal was well-taken and granted Petitioner 17 days in which to file his notice of appeal. Petitioner complied with the District Court order. He filed his notice of appeal by the deadline set by the District Court. Based on these unique circumstances, the rules should not have been so inflexibly applied without regard to the underlying circumstances. *Fallen v. United States*, 378 U S 139, 142 (1964). Instead, Petitioner's time to appeal should have been tolled based upon basic principles of fairness and equity.

A third reason was that any perceived defect was 'curable." Notwithstanding the Sixth Circuit's ruling that it had no jurisdiction over the order of the District Court reopening the appeal, the Sixth Circuit did have jurisdiction to cure any defect

Since it is the usual practice of courts to decide appeals on their merits, the Sixth Circuit could have vacated the February 10, 2004 order of the District Court reopening the appeal and remanded the case to the District Court with instructions to grant time to reopen the appeal for the fourteen (14) day period specified by the rule. Thus, any deficiency would have been cured at that juncture.

Lastly, the District Court did have authority to extend the fourteen (14) period. The only jurisdictional barrier, if there were one, was that Petitioner's motion to reopen the appeal had to be filed within 180-days of the entry of the order of the District Court. Petitioner complied with that deadline. There was no restriction against granting more than fourteen (14) days to Petitioner to file his notice of appeal.

Indeed, basic concepts of equity and fairness certainly should favor Petitioner, Petitioner, understandably, did all he

could do in the circumstances and should not have been summarily deprived of his appellate rights.

ARGUMENT

A DISTRICT COURT MAY PROPERLY GRANT AN EXTENSION OF TIME BEYOND THE FOURTEEN (14) DAYS AUTHORIZED BY RULE 4(a)(6) OF THE FEDERAL RULES OF APPELLATE PROCEDURE WHEN GRANTING A TIMELY FILED MOTION TO REOPEN THE APPEAL TIME.

The Sixth Circuit, in its opinion, framed the issue as follows:

> [T]he fourteen-day period of Rule 4(a)(6) of the Federal Rules of Appellate Procedure is not susceptible to extension through mistake, courtesy or grace. 432 F.3d 668, 669 (6th Cir. 2005) (Jt. App. 177).

The District Court granted Petitioner's motion to reopen his appeal in a marginal entry. While a court should make findings stating that all of the requirements of Rule 4(a)(6) have been satisfied, it must be assumed that the District Court so found. In any event, there was no objection by Respondent.

As noted by Chief Judge Posner of the Seventh Circuit Court of Appeals:

> The new rule does not grant a district judge carte blanche to allow untimely appeals to be filed. He must make findings that the conditions prescribed by the rule have been satisfied. This requirement is important to prevent the rule from being treated by judges and litigants as purely discretionary, transforming the 30-day period for taking an appeal into a 180-day period. *Matter of Marchiando*, 13 F.3d 1111, 1114 (7th Cir. 1994).

In this case, the District Court did not act in an arbitrary manner in granting Petitioner's motion to reopen his appeal.

As more fully set forth below, Petitioner complied with Rule 4(a)(6)'s "jurisdictional" requirements. As a result, the District Court acted properly in allowing him to reopen his appeal.

A. Rule 4(a)(6) Is A "Claim-Processing" Rule Requiring A Timely Objection By Respondent.

The Sixth Circuit, in its opinion, went to great lengths in distinguishing the most recent pronouncements on appellate jurisdiction and "inflexible claim-processing" rules which were considered by this Court in *Eberhart v. United States*, 126 S.Ct. 403 (2005) and *Kontrick v. Ryan*, 540 U.S. 443 (2004).

The Sixth Circuit distinguished *Kontrick* ruling that, because no statute specified a time limit for filing a complaint objecting to a debtor's discharge, the controlling time limitations were those set forth in the Federal Rules of Bankruptcy Procedure. Thus, because the petitioner in *Kontrick*, in answering an untimely complaint, did not address the issue of untimeliness, he forfeited any right to rely on the time limits of the Federal Rules of Bankruptcy Procedure.

Further, the Sixth Circuit ruled that Petitioner's case was different from *Eberhart* because the government had opposed defendant's motion for a new trial which, in part, was untimely, on the merits. The government thus had not ignored any timeliness issue:

> In both these ways, the case at bar is distinguishable. The government, did not, nor did it need to, oppose Bowles's Rule 4(a)(6) motion in the district court. Instead, it objected to the timeliness of the appeal in its brief. (See Br. Of Resp't. at 1) ("This Court lacks jurisdiction to hear this appeal"). And, in contrast to the situation in Kontrick, Congress has limited our jurisdiction in the Act of December 9, 1991, Pub.L. 102-198, § 12, 105 Stat. 1623, 1627 (codified at 28 U.S.C.

> § 2107) ("the district court may . . . reopen the time for appeal for a period of 14 days. . . ."). For these reasons, we think that Rule 4(a)(6) is, in fact, "a prescription [ ] delineating the classes of cases" that we may hear. 540 U.S. at 455. In addition, the respondent, by objecting in his brief to this court, never forfeited his right to strict adherence to Rule 4. 432 F.3d at 672 n.1 (emphasis added) (internal citations omitted) (Jt. App. 181-82).

The Sixth Circuit presumptively attributed Petitioner's or his counsel's lack of notice as "fault for failing to comply with the requirements imposed by electronic filing" 432 F.3d at 670 (emphasis added) (Jt. App. 179).

Respondent filed no written opposition to Petitioner's Appellate Rule 4(a)(6) motion to reopen the appeal time, which was filed on December 12, 2003. Respondent's first written allusions to any jurisdictional issue were oblique references in two sentences in Respondent's appellate brief which was filed March 14, 2005, some thirteen (13) months after the February 10, 2004 order.

The facts in this case are even more compelling because, in past cases, the lack of filing an objection did not preclude even untimely submissions which did not have the imprimatur of a court order. In this case, by contrast, Petitioner's notice of appeal was expressly authorized by the District Court. ("Appeal to be filed by 2/27/04"). In other cases where there has been no prior court authorization, the failure of the opposing party to timely object has been deemed fatal to any opposition.

Analyzing this issue properly as a "claim-processing" one, the burden of due diligence to timely object would rightly be placed on the party who would be adversely affected by an untimely filing. As noted in *Eberhart v. United States, supra*, "These claim-processing rules thus assure relief to a party properly raising them, but do not compel the same result if the party forfeits them." 126 S Ct at 407 (emphasis added)

Likewise, in *Kontrick v. Ryan, supra*, this court framed the issue as "whether Kontrick forfeited his right to assert the untimeliness of Ryan's amended complaint by failing to raise the issue until after that complaint was adjudicated on the merits. . . ." 540 U.S. at 458 (emphasis added).

In the present case, Respondent's delinquency of thirteen (13) months should have yielded the same result. Respondent did not object until he filed his brief in the Sixth Circuit on March 14, 2005.

The 'jurisdictional" analysis by the Sixth Circuit in this case was incorrect. In *Eberhart*, this Court rejected the court of appeals' reliance on *United States v. Robinson*, 361 U.S. 220 (1960), concluding that *Robinson* did not address the issue of subject matter jurisdiction of a district court. It was on that basis that *Robinson* was "narrow and unremarkable" as "district courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked." 126 S Ct at 406 (emphasis added). The unanimous decision in *Eberhart* observed that prior cases, including *Robinson*, which held that the timely filing of a notice of appeal was mandatory and jurisdictional, created some confusion. Thus, the essence of *Eberhart* was that the rules were not jurisdictional, only merely "claim-processing rules, [which] assure relief to a party properly raising them, but do not compel the same result if the party forfeits them." 126 S.Ct. at 407 (emphasis added).

Petitioner, in this case, did not forfeit his right to appeal. He relied reasonably on a ruling by the District Court to file his appeal by February 27, 2004.

While petitioner was not proceeding *pro se*, he was in a similar situation to that faced by a *pro se* litigant in *Houston v. Lack*, 487 U.S. 266 (1988). In *Houston*, petitioner, a *pro se* litigant, timely drafted a notice of appeal and deposited the notice with the prison authorities for mailing to the district

court. However the notice of appeal did not arrive at the district court until thirty-one (31) days after the judgment. This was one (1) day after the expiration of the thirty (30) day filing period for filing a notice of appeal mandated by Rule 4(a)(1) of the Federal Rules of Appellate Procedure. Consequently, the appeal was dismissed as being out of time. The appellate court ruled that it was without jurisdiction

This Court reversed, ruling that delivery to prison authorities for mailing sufficed. The failure of prison authorities to forward the notice of appeal to the clerk of courts before the appeal time expired did not deprive the appellate court of jurisdiction

While the petitioner in *Houston* had proceeded *pro se*, Petitioner in this case is in a similar predicament. Petitioner relied on the District Court's order. There was no objection to Petitioner's request. As noted above, Respondent's objection appeared in a second cryptic statement. In his appellate brief: "This Court lacks jurisdiction to hear an appeal from any judgment denying Bowles' claims on the merits." (Respondent-Appellee's Final Brief at p. 4). (emphasis added). Up to that point, there was no objection nor was there any appeal filed by Respondent from the District Court's order of February 10, 2004. The Sixth Circuit had even issued a series of orders addressing the jurisdictional issue before it. The Sixth Circuit, on one occasion, had even denied Petitioner a certificate of appealability. A certificate of appealability was later granted after the court granted Petitioner's motion for reconsideration and ordered briefing on merit issues in Petitioner's habeas appeal. (Jt. App. 174).

Given the District Court's extension of time to February 27, 2004, "petitioner did all he could under the circumstances." *Fallen v. United States*, 378 U.S. 139, 144 (1964), and his appeal should not have been dismissed.

B. "Unique Circumstances" And Reasonable Reliance On A Court Order Equitably Tolled Petitioner's Time To Appeal.

A conundrum in this case was the Sixth Circuits's recognition of but distinguishing the "unique circumstances" where courts have allowed an appeal even if filed outside any statutory or rule-mandated time limitation. The Sixth Circuit cited *Osteneck v. Ernst & Whinney*, 489 U.S. 169 (1989), which held that a post-judgement motion for prejudgment interest was a motion under Rule 59 of the Federal Rules of Civil Procedure which extended the time for filing a notice of appeal while that motion pended. The Sixth Circuit, in declining to follow the reasoning of *Thompson*, noted that *Thompson* required a "specific assurance" 489 U.S. at 177. Significantly, the Sixth Circuit ruled that *Osteneck* limited *Thompson* because it

> "applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal *and has received specific assurance by a judicial officer that this act has been properly done.*" 432 F.3d at 675. (Jt. App. 187).

It is difficult to conceive a situation where an act could not receive any more judicial approbation than the present case. The District Court specifically granted Petitioner's application to reopen his appeal by setting a specific date. How much more assurance from a judicial officer can one receive? The District Court did not grant an open-ended period to reopen the appeal but set a specific date by which an appeal had to be filed. This is especially important because Respondent, at no time, until his brief filed in the Sixth Circuit some thirteen (13) months later, alluded to the fact that the court was without jurisdiction to consider Petitioner's appeal. If litigants cannot rely on a statement by a court then there would be no basis to rely on anything even a written statute or rule.

The inflexible application of Rule 4(a)(6) of the Federal Rules of Appellate Procedure ignored this Court's caveat that "the Rules are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances." *Fallen v. United States*, 378 U.S. 139, 142 (1964) (emphasis added).

Unlike *Kontrick*, this case can be resolved based on "equitable tolling or any other equity-based exception. . . ." 540 U.S. at 457. One may not in good faith argue that a litigant does not have a right to rely upon an unequivocal order made by a court especially when that court has the authority to issue the order. The District Court in this case had the authority to allow Petitioner a period of time to reopen his appeal. Petitioner reasonably relied on the court's express authorization which set a specific date to file his notice of appeal, *i.e.*, February 27, 2004.

This case differs from *Browder v. Director, Dept. of Corrections of Illinois*, 434 U S 257 (1978), where petitioner, who had been granted a writ of habeas corpus, timely objected to respondent's untimely motion which requested a further stay of execution and an evidentiary hearing by contending that the district court had no jurisdiction to alter and amend its final judgment and order.

The district court in *Browder* nevertheless conducted an evidentiary hearing. It again adhered to its prior ruling and denied respondent's motion to reconsider. A notice of appeal was filed by respondent. Petitioner again asserted that the court of appeals lacked jurisdiction to review the original order granting relief because the notice of appeal was not filed within thirty (30) days of the date of that order and that the time for appealing had not been timely tolled by a proper post judgment motion.

In any event, the Seventh Circuit in *Browder* reversed the District Court's grant of a writ of habeas corpus. Upon further

review by this Court, the Court considered what order or judgment provided the commencement of the time for appealing and what proper available tolling mechanisms were available to toll the time for appealing. The Court ruled that respondent's untimely filing of motions for a stay and for an evidentiary hearing, filed some sixty-eight (68) days after the judgment, deprived the court of jurisdiction Consequently, the judgment of the Court of Appeals was reversed.

In *Pioneer Investment Services Co. v. Brunswick Associates Ltd Partnership*, 507 U.S. 380 (1993), the Court considered whether a creditor's failure to timely file proof of claim, which was the result of excusable neglect, precluded the consideration and allowance of a late claim. In that case, a creditor had relied on an assurance from counsel. Counsel had inadvertently failed to file a proof of claim within a deadline set by the court. This was held to be excusable neglect. The Court ruled that the late filing would be allowed. Here, Petitioner relied on an assurance from the District Court which makes his case even more compelling than *Pioneer, supra* where mere reliance on counsel's representations, not the court, was enough.

In these circumstances, *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) and *Thompson v. INS*, 375 U.S. 384 (1964), should have been applied by the Sixth Circuit to the unique circumstances of this case.

In *Harris Truck Lines, supra*, the judgment of the trial court become final while a lead member of the litigation team was on vacation in Mexico. Thus, another counsel, not knowing whether an appeal should be filed, moved for an extension of the regular thirty (30) day limit for filing a notice of appeal. The district court granted the motion and extended the appeal time for an additional two (2) weeks. Within that two (2) week period the notice of appeal was timely filed. On appeal, the Sixth Circuit ruled that appellant had not met the statutory standard of "excusable neglect based on a failure of

a party to learn of the entry of the judgment" 371 U.S. at 216 (quoting then Fed. R. Civ. P. 73(a) (emphasis added). It therefore dismissed the appeal.

On further review this Court noted that there was an "obvious great hardship to a party who relies upon the trial judge's finding" which finding should be given "great deference." 371 U.S. at 217. (emphasis added). Referencing the existence of the "unique circumstances" which precluded the Court of Appeals from disturbing the trial court judge's ruling as the case presented "unique circumstances" the Court reasoned that substantial justice would be denied to one who, in good faith, relied on the trial judge's ruling.

In *Thompson v, INS, supra*, the trial court accepted an untimely motion for a new trial to which the government did not object. The motion for a new trial was denied. A notice of appeal was filed that was timely with respect to the denial of the motion for a new trial. The court of appeals dismissed the appeal. That dismissal was reversed by the Supreme Court because "petitioner relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline. . . ." 375 U.S. at 387. (emphasis added).

Petitioner, In this case, filed his motion to reopen the appeal within the prescribed 180 day limit. The District Court granted the unopposed motion, presumably finding that all requirements necessary to reopen the appeal time had been satisfied by petitioner. Thus, if Respondent felt the court had erroneously granted the motion to reopen the appeal, a timely objection would have been appropriate. It would be at that point that the Respondent could have asked the court to reconsider and brought to the District Court's attention that it did not have the authority to grant seventeen (17) days but was limited to fourteen (14) days. Thus, this problem could have been obviated with due diligence by Respondent. If

nothing else this is a case &unique circumstances" of a litigant relying on a "trial judge's finding."

The Sixth Circuit considered a situation in which the Ohio Supreme Court had granted defendant in a death penalty case an extension of time to file a petition for post-conviction relief which would toll the time for filing a habeas corpus petition beyond the one-year period specified by 28 U.S.C. §2241(d)(1). In *Keenan v. Bagley*, 400 F.3d 417 (6th Cir. 2005), petitioner Thomas M. Keenan's habeas corpus petition was dismissed by the district court because it was not filed within Title 28 U.S.C. § 2241(d)(1)'s statute of limitations. However, Keenan had been granted a six (6) month extension of time by the Ohio Supreme Court in which to file his petition for post-conviction relief. Keenan timely filed his petition for post-conviction relief within the time period specified by the Ohio Supreme Court. However, in the meantime, the Ohio Legislature had amended the Ohio post-conviction statute requiring a post-conviction petition to be filed within 180 days after the trial transcript from the trial court was filed in the court of appeals. However, Keenan's petition was filed almost two (2) years after the expiration of the 180 day period allowed by the newly enacted section of Ohio Revised Code, § 2953 21.

In *Keenan*, the state trial court had ruled on the merits of his post-conviction petition and dismissed his petition on its merits. However, on appeal, the state court of appeals, *sua sponte*, raised the issue of whether the petition was filed outside the newly enacted statute of limitations. It then denied the appeal on that basis. A further attempted appeal to the Ohio Supreme Court was unsuccessful when that court denied leave to file a discretionary appeal.

In any event, *Keenan* filed his habeas corpus petition within the one-year period after the Ohio Supreme Court had declined to hear his appeal Notwithstanding the Ohio Supreme Court order allowing Keenan to file his petition, the

District Court dismissed the habeas corpus petition as being time-barred. The Sixth Circuit reversed, ruling that equitable tolling was to be considered. The Sixth Circuit ruled that the district court had to consider whether there was 1) a lack of actual knowledge of the filing requirement, 2) a lack of constructive knowledge of the filing requirement, 3) a lack of diligence in pursuing one's rights, or 4) an absence of prejudice to the defendant and petitioner's reasonableness in remaining ignorant of the notice requirements. Therefore, the dismissal was reversed and remanded for an evidentiary hearing applying these factors. (Judge Merritt, in his concurring opinion, would have ruled on appeal that the habeas petition was timely filed.)

A similar situation exists in this case. The District Court, knowingly or unknowingly, granted Petitioner seventeen days (17) days to February 27, 2004, to file his notice of appeal. Petitioner's notice of appeal was filed on February 26, 2004. On appeal, Respondent only obliquely referenced a timeliness issue in a terse statement: "This Court lacks jurisdiction to hear this appeal pursuant to Title 28 U.S.C. 1291, 1294. (Respondent-Appellee's Final Brief at p. 1) (emphasis added). The Sixth Circuit, on its own, then proceeded to dismiss the appeal as being untimely.

The Sixth Circuit did note that it had jurisdiction to consider the February 10, 2004 order of the District Court. However the Sixth Circuit proceeded to ignore this issue in its quizzical statement of "why would, or could, the petitioner appeal the February order when its outcome was favorable to him? We leave this question unanswered." 432 F.3d at 677 (Jt. App. 192).

C. As The Sixth Circuit Retained Jurisdiction Over The District Court's Order Dated February 10, 2004, Any Defect Below Could Have Been Cured.

Overlooked in the convoluted proceedings in the Sixth Circuit was a previous order by the Sixth Circuit that it had jurisdiction over the District Court's February 10, 2004 order allowing Petitioner to reopen his appeal. Consequently, that order was properly before the Sixth Circuit. When the Sixth Circuit ultimately determined that the District Court had erroneously granted an improper extension of time, the proper remedy would be to vacate the order of February 10, 2004 and remand the case to the District Court with instructions to enter a proper order granting Petitioner a fourteen (14) day period of time to file his notice of appeal.

However, that resolution was not considered by the Sixth Circuit even though Petitioner, in his petition for a rehearing, suggested that the Sixth Circuit could consider that alternative. The Sixth Circuit had jurisdiction over the February 10, 2004 order by the District Court. Apparently that remedy was lost in the procedural morass involved in this case. The Sixth Circuit in this case failed to apply any decisions from this Court where litigants have reasonably relied on court orders. The Sixth Circuit, instead, opted for an inflexible bright line mechanical time computation and dismissed the appeal.

The Sixth Circuit did have jurisdiction to review the February 10, 2004 order and relief was available. As noted, a cumbersome, although time-consuming resolution, would have been to vacate the District Court's order reopening the appeal and remand the matter to the District Court to enter a proper order reopening the appeal for a period of fourteen (14) days. This resolution was suggested in the petition for rehearing filed in the Sixth Circuit Thus, this remedy is properly before this Court.

In any event, any perceived deficiency would be "curable." A similar situation was encountered by the litigant in *Becker v. Montgomery*, 532 U.S. 757 (2000). In *Becker* a *pro se* litigant filed a notice of appeal but failed to sign it. The Court of Appeals dismissed the appeal, ruling the defect to be "jurisdictional" and not subject to being cured outside the allowable time for filing a notice of appeal. This Court reversed, noting that "no court . . . officer called [petitioner's] attention to the need for a signature, and the dismissal order, long after the 30-day time to appeal expired, accorded [petitioner] no opportunity to cure the defect." 532 U.S. at 761. (emphasis added).

The court referenced Appellate Rule 1 (a)(2)'s direction to comply with the practice of the district court and applied the Civil Rule 11(a) which allowed an omission of a signature to be supplied after it has been called to the party's attention. Notably Civil Rule 11(a)'s curative feature is not limited to *pro se* litigants but applies to all whether represented or not.

The Sixth Circuit in considering this issue, concluded, notwithstanding a prior order by another Sixth Circuit panel, that "this court has never held that jurisdiction is proper in this case. Rather, when the issue of jurisdiction is properly before us we have consistently found it to be lacking." 432 F.3d at 676. (Jt. App. 190).

Despite Judge Boggs's exegesis on the law of the case doctrine, the February 10, 2004 order was before the Sixth Circuit for consideration. Thus, as previously noted, the matter could have been easily resolved by vacating the February 10, 2004 order of the District Court and remanding the case to the District Court to re-enter an order granting Petitioner fourteen (14) days to file a notice of appeal. This would have obviated the extended discussion concerning jurisdiction and "claim-processing" rules. This remedy would have permitted this case to be decided on its merits.

D. The District Court Had Authority To Extend The Time To Appeal Beyond The Fourteen (14) Day Period.

Rule 1(a)(2) of the Federal Rules of Appellate Procedure states:

> When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

This would necessarily implicate Rule 6(b) of the Federal Rules of Civil Procedure which limits enlargement of time motions only "for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them." Absent in the rule is any explicit statement prohibiting an enlargement of time to file an appeal after granting a Rule 4(a)(6) motion. Therefore, the additional 3-day grant by the District Court was proper.

CONCLUSION

For the reasons set forth above, the Court should reverse the decision of the United States Court of Appeals for the Sixth Circuit and remand this cause to that Court to rule on the merits of Petitioner's appeal.

Respectfully submitted,

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APPENDIX

APPENDIX A

Rule 1. Scope of Rules; Title

(a) Scope of Rules.

(1) These rules govern procedure in the United States courts of appeals.

(2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

(b) [Abrogated]

(c) Title. These rules are to be known as the Federal Rules of Appellate Procedure.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979, Apr. 25, 1989, eff. Dec 1, 1989, Apr. 29, 1994, eff. Dec 1, 1994, Apr 24, 1998, eff. Dec 1, 1998, Apr. 29, 2002, eff. Dec 1, 2002)

ADVISORY COMMITTEE NOTES

1967 Adoption

These rules ate drawn under the authority of 28 U.S.C. § 2072 as amended by the Act of November 6, 1966, 80 Stat. 1323 (1 U.S.Code Cong. & Ad.News, p. 1546 (1966)) (Rules of Civil Procedure); 28 U.S.C. § 2075 (Bankruptcy Rules); and 18 U.S.C. §§ 3771 [§ 3771 of Title 18, Crimes and Criminal Procedure] (Procedure to and including verdict) and 3772 [§ 3772 of Title 18] (Procedure after verdict). Those statutes combine to give to the Supreme Court power to make rules of practice and procedure for all cases within the jurisdiction of the courts of appeals By the terms of the statutes after the rules have taken effect all laws in conflict with them are of no further force of effect. Practice and procedure in the eleven courts of appeals are now regulated by rules promulgated by each court under the authority of 28 U.S.C. § 2071. Rule 47 expressly authorizes the courts of appeals to make rules of practice not inconsistent with these rules.

As indicated by the titles under which they are found, the following rules are of special application: Rules 3 through 12 apply to appeals from judgments and orders of the district courts; Rules 13 and 14 apply to appeals from decisions of the Tax Court (Rule 13 establishes an appeal as the mode of review of decisions of the Tax Court in place of the present petition for review); Rules 15 through 20 apply to proceedings for review or enforcement of orders of administrative agencies, boards commissions and officers. Rules 22 through 24 regulate habeas corpus proceedings and appeals in forma pauperis. All other rules apply to all proceedings in the courts of appeals.

1979 Amendment

The Federal Rules of Appellate Procedure were designed as an integrated set of rules to be followed in appeals to the courts of appeals, covering all steps in the appellate process, whether they take place in the district court or in the court of appeals, and with their adoption Rules 72 to 76 of the F.R.C.P. [rules 72 to 76, Federal Rules of Civil Procedure] were abrogated. In some instances, however, the F.R.A.P. provide that a motion or application for relief may, or must, be made in the district court. See Rules 4(a), 10(b) and 24. The proposed amendment would make it clear that when this is so the motion or application is to be made in the form and manner prescribed by the F.R.C.P. or F.R.Cr.P. [Federal Rules Criminal Procedure] and local rules relating to the form and presentation of motions and is not governed by Rule 27 of the F.R.A.P. See Rule 7(b) of the F.R.C.P. [rule 7(b), Federal Rules of Civil Procedure] and Rule 47 of the F.R.Cr.P. [rule 47, Federal Rules of Criminal Procedure].

1989 Amendment

The amendment is technical No substantive change is intended.

1994 Amendment

Subdivision (c). A new subdivision is added to the rule. The text of new subdivision (c) has been moved from Rule 48 to Rule 1 to allow the addition of new rules at the end of the existing set of appellate rules without burying the title provision among other rules. In a similar fashion the Bankruptcy Rules combine the provisions governing the scope of the rules and the title in the first rule.

1998 Amendments

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only. The Advisory Committee recommends deleting the language in subdivision (a) that describes the different types of proceedings that may be brought in a court of appeals. The Advisory Committee believes that the language is unnecessary and that its omission does not work any substantive change.

2002 Amendments

Subdivision (b). Two recent enactments make it likely that, in the future, one or more of the Federal Rules of Appellate Procedure ("FRAP") will extend or limit the jurisdiction of the courts of appeals. In 1990, Congress amended the Rules Enabling Act to give the Supreme Court authority to use the federal rules of practice and procedure to define when a ruling of a district court is final for purposes of 28 U.S.C. § 1291 *See* 28 U.S.C. § 2072(c). In 1992, Congress amended 28 U.S.C. § 1292 to give the Supreme Court authority to use the federal rules of practice and procedure to provide for appeals of interlocutory decisions that are not already authorized by 28 U.S.C. § 1292. *See* 28 U.S.C. § 1292(e). Both § 1291 and § 1292 are unquestionably jurisdictional statutes,

and thus, as soon as FRAP is amended to define finality for purposes of the former or to authorize interlocutory appeals not provided fox by the latter, FRAP will "extend or hurt the jurisdiction of the courts of appeals," and subdivision (b) will become obsolete For that reason, subdivision (b) has been abrogated, subdivision (b) has been abrogated.

APPENDIX B

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil ease for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 If the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties. In accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a)(1) requires as a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment order.

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed, or

(ii) the filing of a notice of appeal by any defendant.

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision, sentence, or

order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Effect of a Motion on a Notice of Appeal.

(A) If a defendant timely makes any of the following motions under the Federal at Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the last such remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 10 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order—but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)—becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion, or

(ii) the entry of the judgment of conviction

(C) A valid notice of appeal is effective—without amendment—to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) Motion for Extension of Time. Upon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a

period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) Jurisdiction. The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) Entry Defined. A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) If an inmate filed the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to filed a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry

of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing m the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979, Nov. 18, 1988, Pub. L. 100-690, Title VII, § 7111, 102 Stat. 4419, Apr. 30, 1991, eff. Dec. 1, 1991, Apr. 22, 1993, eff. Dec. 1, 1993, Apr. 27, 1995, eff. Dec. 1, 1995, Apr. 24, 1998, eff. Dec. 1, 1998, Apr. 29, 2002, eff. Dec. 1, 2002, Apr. 25, 2005, eff. Dec. 1, 2005.)

ADVISORY COMMITTEE NOTES

1967 Adoption

Subdivision (a) This subdivision is derived from FRCP 73(a) [rule 73(a), Federal Rules of Civil Procedure, this title] without any change of substance. The requirement that a request for an extension of tune for filing the notice of appeal made after expiration of the time be made by motion and on notice codifies the result reached under the present provisions of FRCP 73(a) and 6(b) [rules 73(a) and 6(b), Federal Rules of Civil Procedure] *North Umberland Mining Co v. Standard Accident Ins. Co.*, 193 F.2d 951 (9th Cir., 1952), *Cohen v. Plateau Natural Gas Co.*, 303 F.2d 273 (10th Cir., 1962), *Plant Economy Inc. v. Mirror Insulation Co.*, 308 F.2d 275 (3d Cir., 1962).

Since this subdivision governs appeals in all civil cases, it supersedes the provisions of § 25 of the Bankruptcy Act (11 U.S.C.§ 48). Except in cases to which the United States or an officer or agency thereof is a party, the change is a minor one,

since a successful litigant in a bankruptcy proceeding may, under § 25, oblige an aggrieved party to appeal within 30 days after entry of judgment—the time fixed by this subdivision in cases involving private parties only—by serving him with notice of entry on the day thereof, and by the terms of § 25 and aggrieved party must in any event appeal within 40 days after entry of judgment. No reason appeals why the time for appeal in bankruptcy should not be the same as that in civil cases generally. Furthermore, § 25 is a potential trap for the uninitiated. The time for appeal which it provides is not applicable to all appeals which may fairly be termed appeals in bankruptcy. Section 25 governs only those cause referred to in § 24 as "proceedings in bankruptcy" and "controversies arising in proceedings in bankruptcy." *Lowenstein v Reikes*, 54 F.2d 481 (2d Cir., 1931), *cert den.*, 285 U.S. 539, 52 S.Ct. 311, 76 L.Ed. 932 (1932). The distinction between such cases and other cases which arise out of bankruptcy is often difficult to determine. See 2 Moore's Collier on Bankruptcy ¶ 24.12 through ¶ 24.36 (1962). As a result it is not always clear whether an appeal is governed by § 25 or by FRCP 73(a) [rule 73(a), Federal Rules of Civil Procedure, this title], which is applicable to such appeals in bankruptcy as are not governed by § 25.

In view of the unification of the civil and admiralty procedure accomplished by the amendments of the Federal Rules of Civil Procedure effective July 1, 1966, this subdivision governs appeals in those civil actions which involve admiralty or maritime claims and which prior to that date were known as suits in admiralty.

APPENDIX C

Rule 26. Computing and Extending Time

(a) Computing Time The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute

(1) Exclude the day of the act, event, or default that begins the period.

(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days.

(3) Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or—if the act to be done is filing a paper in court—a day on which the weather or other conditions make the clerk's office inaccessible.

(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

(b) Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file.

(1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or

(2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

(c) Additional Time after Service. When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

(As amended Mar. 1, 1971, eff. July 1, 1971, Mar. 10, 1986, eff. July 1, 1986, Apr. 25, 1989, eff. Dec. 1, 1989, Apr. 30, 1991, eff. Dec. 1, 1991, Apr. 23, 1996, eff. Dec. 1, 1996, Apr. 24, 1998, eff. Dec. 1, 1998, Apr. 29, 2002, eff. Dec. 1, 2002, Apr. 25, 2005 eff. Dec. 1, 2005)

APPENDIX D

Rule 6. Time

(a) Computation. In computing any period of tune prescribed or allowed by these rules, by the local rules of any district court by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specific time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b),

(d) and (e), and 60(b), except to the extent and under the conditions stated in them.

[(c) Rescinded Feb. 28, 1966, eff. July 1, 1966]

(d) For Motions—Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) Additional Time After Certain Kinds of Service. Whenever a party must or may act within a prescribed period after service and service is made under Rule 5(b)(2)(B), (C) or (D), 3 days are added after the prescribed period would otherwise expire under subdivision (a).

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar 1, 1971, eff. July 1, 1971; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 29, 1999, eff. Dec. 1, 1999; Apr. 23, 2001, eff. Dec. 1, 2001, Apr. 25, 2005, eff. Dec. 1, 2005)

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FILED
FEB 23 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 06-5306

In the Supreme Court of the United States

KEITH BOWLES,

Petitioner,

v.

HARRY RUSSELL, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether a litigant who has been granted a motion under Federal Rule of Appellate Procedure 4(a)(6) to reopen the time to appeal must comply with the 14-day time limit set forth in that rule and in the corresponding statute for filing his notice of appeal, or can be excused from his untimely filing by a district court order that erroneously granted a deadline that was beyond that allowed by the rule and statute?

2. Whether an appellate court may dismiss, either sua sponte or in response to an appellee's urging, such an appeal as untimely?

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INTRODUCTION

This case presents a confrontation between the judicial system's interest in preserving the integrity of its procedural deadlines and a litigant's effort to avoid the consequences of his untimely actions.

On one side, the Respondent State here urges the Court to strictly enforce the deadlines for filing notices of appeal, including the deadline that Petitioner Bowles missed. The time limits for appeals play a critical role in policing the boundaries between the district and appellate courts, so they must be rigidly enforced, can be raised sua sponte, and are treated as mandatory and jurisdictional. Accordingly, the Sixth Circuit properly dismissed Bowles's appeal as untimely. On the other side, Bowles claims that, after already having been excused for missing his original deadline for filing his notice of appeal (by the district court's granting his motion to reopen the time to file), he should be excused again—this time for missing the deadline set forth in the very rule he relied upon in his motion. He therefore now appeals the Sixth Circuit's dismissal.

Both 28 U.S.C. § 2107 and the Federal Rules of Appellate Procedure ("Appellate Rules") set forth clear and mandatory deadlines for filing a notice of appeal in a court of appeals, thereby triggering appellate court review. The principle that such notice-of-appeal deadlines are jurisdictional and thus nonforfeitable has been consistently recognized in over 150 years of appellate practice, judicial decisions, and congressional acquiescence. Moreover, courts have inherent power to enforce their own rules sua sponte, even when the rules in question are not jurisdictional. The Sixth Circuit's action in dismissing the case below is simply an uncontroversial instance of a court of appeals dismissing an untimely appeal, as it was authorized and required by law to do.

Bowles's argument, on the other hand, is based on his attempt to appeal to equity. But equitable considerations cannot excuse a litigant from complying with notice of

appeal time requirements because such requirements are necessarily inviolate. Moreover, even if equitable concerns could excuse untimely appeals, Bowles presents no equitable reasons that would justify his untimely filing. Bowles attempts to invoke equity on the ground that he relied on the district court's mistaken calculation of the notice-of-appeal deadline. But Bowles himself requested relief under the very rule with which he did not comply, and in any event, he, like all litigants, is charged with the independent responsibility of complying with the federal rules. Bowles also suggests that equity should support his claim because the State did not take affirmative steps to clarify his due date for him. But it is the responsibility of each party, and not of a party's opponent, to avoid his own errors.

The weakness of his equitable claim notwithstanding, Bowles now asks the Court to overrule 150 years of precedent and repeated congressional recodifications that stand for the essential proposition that untimely appeals must be dismissed. His request should be denied, and the Court should affirm the Sixth Circuit's dismissal of his untimely appeal.

STATEMENT OF THE CASE

An Ohio jury convicted Petitioner Keith Bowles of murder for his participation in a fatal group beating of an unarmed man. Bowles is now serving an indeterminate sentence of fifteen years to life. See JA 177-78 (6th Cir. Op.). After exhausting his opportunities for direct appeal in state court, Bowles filed a federal petition for a writ of habeas corpus. JA 14-22. A magistrate judge issued a report and recommendation that the petition be denied. JA 89-104. In an order and judgment dated July 10, 2003, see JA 141-42, and entered on July 28, 2003, see JA 10 (district court docket), the district court adopted the magistrate judge's report and recommendation over Bowles's objections. The court denied

Bowles's habeas petition, and denied Bowles a certificate of appealability. Bowles moved for a new trial under Federal Rule of Civil Procedure ("Civil Rule") 59 or to amend the judgment under Civil Rule 52. JA 143-44. The district court entered a marginal order denying Bowles's motions on September 9, 2003; this was a final appealable order. JA 145.

Bowles claimed that he was never served with the district court's September 9, 2003 order. JA 147-49. He claimed that he learned of the final order when, about three months after the order was entered, on December 5, 2003, Bowles's lawyer checked the docket and noticed the final order. *Id.* Based upon his lack of timely receipt of the September 9 order, Bowles moved to vacate that order or to reopen the appeal period pursuant to Appellate Rule 4(a)(6). *Id.* In his motion to reopen, he quoted the full text of Appellate Rule 4(a)(6), which states that, if certain conditions are met, "the district court may reopen the time to file an appeal for a period of 14 days after the date when the order to reopen is entered." JA 148. Bowles cited no authority for his motion to vacate, but stated that the motion was "because the undersigned was never sent nor did the undersigned ever received [sic] notification of [the September 9] order." JA 147. Bowles's motion to vacate, therefore, was not premised upon the merits of his habeas claims or upon any other alleged error in the district court's judgment.

In a marginal order entered February 10, 2004, the district court denied Bowles's motion to vacate, but granted his Rule 4(a)(6) motion to reopen time for appeal. The district court's marginal notation stated, in part, "appeal to be filed by 2/27/04," i.e., 17 days after the order to reopen was entered, or three days more than the 14 that Appellate Rule 4(a)(6) allows. JA 151.

Bowles eventually filed his notice of appeal on February 26, 2004, which was 16 days after the district court

granted his motion to reopen. JA 153. The notice therefore was not timely under the Rule, although it was filed before the deadline stated in the district court's order.

Bowles's notice of appeal said that he appealed: 1) the district court judgment and order dated July 10, 2003 (the order on the merits, denying Bowles's habeas petition and denying a certificate of appealability), and 2) the district court judgment and order entered September 9, 2003 (denying Bowles's Rule 52 and Rule 59 motions). Bowles's notice of appeal did *not* state that he appealed the district court's February 10, 2004 order denying his motion to vacate and granting his motion to reopen time for appeal. JA 153.

The Sixth Circuit docketed Bowles's appeal on March 3, 2004. See JA 1 (6th Cir. docket). The Sixth Circuit's clerk's office noted that Bowles's notice of appeal fell outside of the 14-day window permitted under 4(a)(6), and on March 10, 2004, it ordered Bowles to show cause why the appeal should not be dismissed as untimely. JA 154. Bowles responded that he had relied upon the district court's order, which expressly re-opened his appeal window until February 27, 2004. JA 156. Bowles also asked, for the first time, that the court also review the district court's February 10, 2004 order, since, "in any event, . . . [t]he notice of appeal was filed within thirty (30) days of the date of that order." JA 156-57. The court did not ask the State to respond.

A Sixth Circuit panel then dismissed Bowles's appeal from both the July 10[1] order denying his habeas petition as well as the September 9 order denying his Civil Rule 52 and 59 motions, finding both appeals to be untimely under Appellate Rule 4(a). The court then concluded that "[t]he

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[1] The Sixth Circuit's order refers to the district court's order by the date it was entered, as opposed to the date that it was signed. It therefore states it is dismissing Bowles's appeal from the "July 28, 2003 order."

appeal was timely filed as it applies to the February 10, 2004 ruling," that is, the ruling denying Bowles's motion to vacate and granting his motion to reopen his appeal window, which Bowles's original notice of appeal did not mention. JA 161.

Bowles also failed to ask the Sixth Circuit for a certificate of appealability ("COA"), but the Sixth Circuit construed Bowles's notice of appeal as an application for a COA, as Appellate Rule 22(b)(2) allows. Bowles was required to obtain a COA from the appeals court because the district court had denied him one, and 28 U.S.C. § 2253(c)(2) requires habeas petitioners to obtain a COA from one of the two courts. On September 8, 2004, the court denied Bowles a COA, noting that the standard requires "a substantial showing of the denial of a constitutional right," JA 162, and that "Bowles has not met that burden here because his claims are all lacking in substantive merit, barred by an unexcused procedural default, and/or based on issues of state law that do not rise to the level of a constitutional violation," JA 163.

Bowles sought reconsideration, arguing the merits of his habeas claims but failing to address the untimeliness of his appeal. JA 164-73. A new panel reviewed Bowles's motion, construing it as a petition for panel rehearing under Appellate Rule 40(a), and ruled on the petition without asking the State to respond. Under Appellate Rule 40(a)(3), the State could not respond without the court's request. The panel granted Bowles a COA on one of his habeas issues. JA 174.

The parties completed briefing by April 25, 2005. In the State's four-page jurisdictional statement, it argued that the court lacked jurisdiction over the appeal, and called the court's attention to the untimeliness of Bowles's notice of appeal under Rule 4(a)(6). See Respondent-Appellee's Final Br., p. 1-4 (filed with United States Court of Appeals for the Sixth Circuit on April 22, 2005) ("Respondent's 6th Cir.

Br."). Bowles declined to file a reply brief, see JA 3-4 (6th Cir. docket), so he never responded to the State's jurisdictional argument.

The case was submitted on the briefs. The Sixth Circuit filed an opinion and judgment dismissing Bowles's appeal as untimely on December 28, 2005. JA 176-92. Bowles filed a petition for rehearing and suggestion for rehearing en banc, in which he addressed the issue of his untimely appeal and for the first time requested that the court, rather than dismiss his appeal, remand for a new district court order reopening the appeal window. The court of appeals denied Bowles's petition for rehearing and suggestion for rehearing en banc. JA 193.

Bowles petitioned for a writ of certiorari on July 14, 2006. The Court granted Bowles's petition for certiorari review on December 7, 2006.

SUMMARY OF THE ARGUMENT

Bowles's notice of appeal was untimely under the plain language of Rule 4(a)(6) and 28 U.S.C. § 2107. Even if the State had never argued untimeliness, the Sixth Circuit was required to dismiss Bowles's appeal. The courts have treated notice-of-appeal deadlines as jurisdictional for more than 150 years, and Congress has ratified and incorporated this understanding in its repeated recodification of the governing statute. Regardless of whether such deadlines are labeled an aspect of subject-matter jurisdiction or a "prerequisite" to appellate jurisdiction, courts have, with good reason, consistently treated them as nonforfeitable.

Even if the Sixth Circuit had not been obligated to dismiss Bowles's untimely appeal, it did not err in so doing. The State properly raised the issue in its appellee brief, to which Bowles did not respond, and the merits panel properly considered and accepted the argument. Further, the Court has

long recognized that a circuit court has the inherent authority to enforce appeal deadlines. If courts were to lose that power, as Bowles urges, efficient maintenance of federal court dockets would depend solely on the diligence and discretion of the parties.

Having failed on the law, Bowles cannot salvage his case by appeals to equity. Bowles seeks to invoke the equitable doctrine of "unique circumstances," but that doctrine requires a showing of reasonable reliance, and Bowles cannot clear that bar. First, he raises no reliance interest. He did not, as he contends, do "all he could under the circumstances," see Pet. Br. at 13; he could have easily filed his notice of appeal in 14 days. Second, litigants in any event are not relieved of their obligation to comply with the federal rules merely because a district court makes an obvious error.

Finally, Bowles's alternate "remand" suggestion—that the Sixth Circuit should have remanded the case to the district court to again reopen the time to appeal—is untenable. Bowles's appeal was untimely filed, so the appellate court had no jurisdiction and thus no authority to remand. Even if it had such authority, it did not abuse its discretion in declining to remand.

The Court should affirm the Sixth Circuit's judgment dismissing Bowles's appeal.

ARGUMENT

A. Bowles's appeal was untimely.

Bowles's appeal was untimely because the Appellate Rules and United States Code bar a party from appealing more than 14 days after the time for appeal has been reopened, regardless of what a district court purported to authorize.

Congress has vested the courts of appeals with jurisdiction over certain appeals, including final orders from district courts, see 28 U.S.C. § 1291, but prohibits the appellate courts from hearing an appeal unless the appealing party files a timely notice of appeal, see 28 U.S.C. § 2107. The Supreme Court has rulemaking authority to establish the procedures through which these conditions will be satisfied. 28 U.S.C. § 2072. The current rules governing timely filing of a notice of appeal are the Appellate Rules.

A notice of appeal is unique among procedural filings, as its filing is the event that triggers transfer of a case from district court to appellate court, thus creating *jurisdiction* in the appeals court. The requirement that an appellant initiate an appeal by filing a notice of appeal is set forth in both 28 U.S.C. § 2107 and Appellate Rule 3. "The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). "And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act." *Id.* at 61.

Reflecting the importance of the notice of appeal filing, the Appellate Rules and United States Code strictly limit the time in which a party may file the necessary notice of appeal. "An appeal permitted by law as of right from a district court to a court of appeals may be taken *only* by filing a notice of appeal with the district clerk *within the time allowed by Rule 4*." Fed. R. App. P. 3(a)(1) (emphases added). Under Rule 4(a)(1), a private civil party typically has 30 days from the judgment entry to file a notice of appeal. See also 28 U.S.C. § 2107(a) (stating "*no appeal shall bring* any judgment, order or decree in an action, suit or proceeding of a civil nature *before a court of appeals* for review unless notice of appeal is filed, within 30 days after the entry, [with certain limited exceptions]") (emphases added).

Appellate Rule 4 and § 2107 provide for two very limited exceptions to the 30-day appeal window. First, a party may seek an extension if he applies for the extension within 30 days of the expiration of his first appeal period, but he must show excusable neglect or good cause, and the extension may not exceed the longer of 30 days from the end of the original appeal period or 10 days from the district court's entry of its order. See 28 U.S.C. § 2107(c); Fed. R. App. P. 4(a)(5). Second, within 180 days of the district court's judgment, an appellant may petition for reopening the appeal period for 14 days, if the appellant did not receive notice of final judgment and if he applies for reopening within seven days of learning of the final judgment. See 28 U.S.C. § 2107(c)(1)-(2); Fed. R. App. P. 4(a)(6).

The Appellate Rules do not allow any expansions of the appeal notice deadline other than those explicitly permitted under Rule 4. Indeed, unique among all of the Appellate Rule deadlines, only notice-of-appeal deadlines are fixed and unable to be extended by a district court for good cause. See Fed. R. App. P. 26(b). The timely-appeal requirement is also unique among all of the Rule 3 conditions: If an appellant fails to satisfy any of the other requirements set forth in Rule 3 for taking an appeal, including rules governing the contents of the notice of appeal and the manner of service, the error "does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal." See Fed. R. App. P. 3(a)(2). By contrast, the failure to file a timely notice of appeal is the one act that *does* affect the validity of the appeal. It implicitly carries with it a harsher sanction than the court's *discretionary* ability to dismiss: *mandatory* dismissal.

Here, Bowles failed to satisfy the Appellate Rules' and § 2107's requirement regarding a timely notice of appeal, so he failed to perfect an appeal to the Sixth Circuit. Bowles

claimed he did not learn of the district court's final order until three months after it was entered. See JA 179. By that point, Bowles had missed both the standard deadline for filing a notice of appeal and the deadline for seeking an extension under Rule 4(a)(5) and § 2107(c), so he could appeal only if the district court granted a motion under Appellate Rule 4(a)(6) and § 2107(c)(1)-(2) to reopen the appeal period for 14 days. The district court granted Bowles's 4(a)(6) motion on February 10, 2004, but mistakenly gave Bowles 17 days to file his notice of appeal. See JA 145 (district court marginal order). Although Bowles was aware of the Rule's 14-day time limit—indeed, he had recited it *verbatim* in his motion to reopen—he nevertheless took 16 days to file his one-page notice of appeal. See JA 153.

The district court had no authority to extend the 14-day window provided under Rule 4(a)(6). Appellate Rule 26(b)(1) specifically prohibits the court from extending the time to file a notice of appeal "except as authorized in Rule 4." See also National Association of Criminal Defense Lawyers ("NACDL") Amicus Br. at 6 (conceding that "district court clearly erred in permitting petitioner to file a notice of appeal more than 14 days after the court issued its order"). Furthermore, the Rule's Committee Notes confirm that the drafters intended to provide a "limited" window for appeal, and expressly state that if a Rule 4(a)(6) motion is granted, "the district court may reopen the time for filing a notice of appeal *only* for a period of 14 days from the date of entry of the order reopening the time for appeal." See 1991 Committee Notes to Rule 4(a)(6) (emphasis added).[2]

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[2] Bowles's reliance on Civil Rule 6 is misplaced, because that rule governs extensions only for time frames specified "by *these rules*" (emphasis added), that is, by the Federal Rules of *Civil* Procedure. Civil Rule 6 does not apply to extend the appeals deadline, which is

Because Bowles's appeal was untimely under Rule 4 and 28 U.S.C. § 2107, the Sixth Circuit merits panel properly dismissed Bowles's untimely appeal.

B. The circuit court was required to dismiss Bowles's untimely appeal.

As discussed below in Part C.1, the State properly objected to Bowles's untimely appeal; it did so in the State's first responsive brief in the appeals court. But, in any event, the untimeliness argument is not subject to appellee forfeiture, since Bowles's untimely appeal is jurisdictionally defective. Bowles needs to convince the Court *both* that the appeals deadline is a forfeitable appellee defense *and* that the State forfeited it here. The State may win on either point; as it happens, it wins on both.

1. The courts of appeals do not have jurisdiction to hear untimely appeals.

The enforcement of deadlines is essential to the effective functioning of a legal system. With respect to notices of appeal, moreover, rigid adherence to time limits is especially critical, because those time mandates enforce finality and set forth the divisions of authority between the lower and the appellate courts. Not surprisingly, then, the Court for over 150 years has accurately described the time requirements governing the filing of a notice of appeal as

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specified by *Appellate* Rule 4(a) and which is rendered inflexible by *Appellate* Rule 26(b). Appellate Rule 1(a)(2)'s instruction to comply with district court practices when filing a notice of appeal does not, as Bowles contends, operate to nullify the Appellate Rules governing time for appeal. Indeed, the prohibition on extending appeal time was once part of Civil Rule 6 itself, until incorporated into Federal Rules of Criminal Procedure and then, later, the Appellate Rules. See *United States v. Robinson*, 361 U.S. 220, 228-29 (1960).

nonforfeitable and jurisdictional. See E. King Poor, *Jurisdictional Deadlines in the Wake of* Kontrick *and* Eberhart: *Harmonizing 160 Years of Precedent*, 40 Creighton L. Rev. 181, 187-90 (2007). Equally important, Congress has refused to disrupt this fundamental understanding when it repeatedly codified notice-of-appeal deadlines for the courts of appeals. See Evarts Act of 1891, ch. 517, § 11, 26 Stat. 826, 829; Act of March 3, 1911, ch. 231, § 129, 36 Stat. 1087, 1134; Judiciary Act of 1925, ch. 229, § 8, 43 Stat. 936, 940; Act of June 25, 1948, ch. 646, § 2107, 62 Stat. 963, 963, codified at 28 U.S.C. § 2107. Bowles now seeks to overturn a lengthy history of judicial decisions and congressional acquiescence.

A defect in an appeals court's subject-matter jurisdiction is not subject to forfeiture by an appellee's failure to raise the issue; whenever a court perceives that it lacks jurisdiction over an appeal, the court must sua sponte dismiss the appeal. See *Mansfield, Coldwater & Lake Mich. RR. Co. v. Swan*, 111 U.S. 379 (1884). "Characteristically, a court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct." *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004).

An appeal's untimeliness was considered a jurisdictional bar even before the courts of appeals were created. In *United States v. Curry*, 47 U.S. (6 How.) 106, 110 (1848), the Court dismissed an appeal "for want of jurisdiction" because the appellant failed to timely comply with the statutory requirements for appealing. The Court observed that Congress, and not the courts, has the "power to prescribe the time or manner in which the record was to be transmitted, and the case brought before this court" on appeal. *Id.* at 112. In rejecting the argument that the error was a "mere technicality, and may be regarded rather as a matter of form than of substance," the Court noted that it had no authority to disregard rules set forth by Congress for the

operation of the courts, and observed that, "if the mode prescribed for removing cases . . . be too strict and technical, and likely to produce inconvenience or injustice, it is for Congress to provide a remedy by altering the existing laws; not for the court." *Id.* at 113. Accordingly, the Court dismissed the appeal for lack of jurisdiction. *Id.*

The *Curry* Court's treatment of an appeal deadline as jurisdictional is echoed in several other Court decisions from the same time period. See *Scarborough v. Pargoud*, 108 U.S. 567, 568 (1883) (dismissing case for lack of jurisdiction due to untimely lodging of writ of error); *Credit Co. Ltd. v. Ark. Cent. Ry. Co.*, 128 U.S. 258, 261 (1888) (dismissing appeal sua sponte on ground that appellant had not complied with requisite deadline); *Villabolis v. United States*, 47 U.S. (6 How.) 81 (1848), (declaring that party's effort to appeal without complying with Congress's appeal requirements "was a mere nullity" and therefore "must be dismissed."); *Steamer Virginia v. West*, 60 U.S. (19 How.) 182, 183 (1856) (dismissing appeal for lack of jurisdiction due to appellant's failure to file transcript by deadline); *Mesa v. United States*, 67 U.S. (2 Black) 721 (1862) (same); *Edmonson v. Bloomshire*, 74 U.S. 306, 310 (1869) (same).

The Court continued to interpret the deadline as jurisdictional under later law. In *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943), the Court again declared it was "without jurisdiction to entertain" an appeal filed past the statutory deadline for appeals to the Supreme Court. The rule's purpose, the Court observed, is "to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands." "Any other construction of the statute," the Court noted, "would defeat its purpose." *Id.*

When Congress created the courts of appeals it continued to require that appeals be taken within a certain time, see Evarts Act of March 3, 1891, 26 Stat. at 829, just as it had done when it created the very first lower federal courts, see Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 85. The Act creating the appeals courts stated that "no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit courts of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed," and any existing shorter deadlines remained in effect. *Id.* In 1925, Congress reduced the deadline to three months. Judiciary Act of 1925, 43 Stat. at 940.

Congress reenacted the statutes conferring appellate court jurisdiction in 1948, again including a mandatory deadline for notices of appeal. See Act of June 25, 1948, 62 Stat. at 963, codified at 28 U.S.C. § 2107. Since then, Congress has continued to endorse the mandatory language regarding satisfying the appeal deadline. See Act of May 24, 1949, ch. 139, §§ 107-08, 63 Stat. 89, 104-05; Act of Nov. 6, 1978, Pub. L. No. 95-598, Title II, § 248, 92 Stat. 2549, 2672. The most recent revision harmonized § 2107 with the recent edits to Appellate Rule 4(a)(6). See Act of Dec. 9, 1991, Pub. Law No. 102-198, § 12, 105 Stat. 1623, 1627.

Since § 2107's enactment, the Court has continued to characterize the appeal deadline as jurisdictional. In *United States v. Robinson*, 361 U.S. 220, 229 (1960), the Court held that a district court could not enlarge the appeal time upon a finding of excusable neglect, noting that "[t]he courts have uniformly held that the taking of an appeal within the prescribed time is mandatory and jurisdictional." In *Fallen v. United States*, 378 U.S. 139, 142 (1964), the Court declared that "the timely filing of a notice of appeal is a jurisdictional prerequisite to the hearing of the appeal." Citing *Robinson*, the Court said again, in *Browder v. Director, Illinois Dep't of*

Corr., 434 U.S. 257, 264 (1978), that Rule 4(a)'s 30-day time limit is "mandatory and jurisdictional." By 1982, the Court described as "well settled" the jurisdictional nature of the timely-notice-of-appeal requirement. *Griggs*, 459 U.S. at 61. In *Smith v. Barry*, 502 U.S. 244, 249 (1992), the Court reemphasized the jurisdictional nature of Appellate Rules 3 and 4 by contrasting their requirements with the *non*jurisdictional requirements of other rules. And in 2001, the Court took the opportunity to "clarify" that the appeal deadlines set forth under Appellate Rules 3 and 4 and § 2107 are jurisdictional. See *Becker v. Montgomery*, 532 U.S. 757, 760, 765 (2001). Therefore, "*if the notice is timely filed* and adequate in other respects, jurisdiction will vest in the court of appeals." *Id.* (emphasis added); see also *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 n.6 (2003) (recognizing that § 2107 is jurisdictional).[3]

The Court also has not restricted its discussion of jurisdictional appeal deadlines to cases involving appeals from district courts. The Appellate Rules and § 2107 apply with equal jurisdictional force when a party seeks appellate

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[3] When Congress, through the Rules Enabling Act of 1934, 48 Stat. 106, gave the Court the power to promulgate rules governing federal procedure, Congress did not alter the basic understanding that compliance with those deadlines was jurisdictional. Even after vesting the Court with this power, Congress's recodification of the Title setting forth appellate court jurisdiction continued to provide a mandatory deadline for taking an appeal. See Act of 1948, 62 Stat. at 963. The Court has continued to treat both the statute and corresponding rules as setting jurisdictional appeal deadlines. See, e.g., *Becker*, 532 U.S. at 765; *Browder*, 434 U.S. at 258; *Robinson*, 361 U.S. at 224, 229; *Coppedge v. United States*, 369 U.S. 438, 442 n.5 (1962); cf. *Smith v. Barry*, 502 U.S. at 686 (contrasting *non*jurisdictional Rules such as Fed. R. App. P. 31(a) with Rules' timely-appeal requirement). And in 1991, Congress again endorsed the Court's understanding by passing the statute again. See Act of Dec. 9, 1991, Pub. Law No. 102-198, 105 Stat. at 1627.

court review of an agency determination, including appeals from the Board of Immigration Appeals. When an untimely petition is filed, the Court has observed, the court of appeals "lack[s] jurisdiction to review [the Board of Immigration Appeals'] order." *Stone v. INS*, 514 U.S. 386 (1995).

The Court has also continued to treat as jurisdictional the statutory deadline for petitioning the Court for certiorari review. Under 28 U.S.C. § 2101(c), a party to a civil action must petition for a writ of certiorari with the Supreme Court within 90 days of the lower court's judgment. In *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990), the Court called the 90-day limit for civil cases "mandatory and jurisdictional," and held that the Court is obligated to dismiss a petition if a petitioner does not satisfy the statute's requirement. See also *Fed. Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 90-91 (1994). Similarly, in 2004, the Court continued to refer to the § 2101(c) deadline as jurisdictional, observing that, "[b]ecause the petition for a writ of certiorari was timely under § 2101(c), we have jurisdiction to decide [the case]." See *Hibbs v. Winn*, 542 U.S. 88, 99 (2004).

The Court's description of appeal deadlines as "jurisdictional" has not been merely a matter of labeling, as the Court has repeatedly explained how the jurisdictional nature of deadlines obliges courts to police compliance. As with its treatment of other "jurisdictional" requirements, the Court has repeatedly identified a judicial duty to examine the issue of timely appeal sua sponte, regardless of whether a party has raised the issue. Thus, arguments regarding untimely appeal are not subject to forfeiture. As early as 1869, the Court expressly recognized its obligation to dismiss untimely appeals even absent a party's motion. See *Edmonson*, 74 U.S. at 310.[4] The Court reaffirmed that

[4] In a case decided before *Edmonson*, the Court suggested in dicta that courts could not take judicial notice of time limits on writs of error.

position in *Credit Co. Ltd.*, 128 U.S. at 258, when, after hearing argument on the merits, the Court sua sponte called counsels' attention to the untimeliness of the appeal and ultimately dismissed the appeal on those grounds. The Court has continued to consider notice-of-appeal issues even where appellees had failed to raise such issues. In *Becker*, for example, the Court appointed amicus curiae to defend the appeals court's sua sponte dismissal, because the respondent agreed with the petitioner's position that his appeal should be heard on the merits. See 532 U.S. at 761-62. But if jurisdictional notice-of-appeal requirements were subject to forfeiture, the respondent's express *concession* would have ended the matter. See also *Houston v. Lack*, 487 U.S. 266, 269-70 (1988) (addressing whether a notice of appeal was untimely even though untimeliness was not raised by appellee); *Foman v. Davis*, 371 U.S. 178, 179-80 (1962) (same).

Congress's continual acquiescence to the Court's longstanding interpretation of appeals deadlines evinces its intent that such deadlines be treated as jurisdictional hurdles. The Court gives particular weight to *stare decisis* in statutory interpretation, since Congress could amend its statute to supercede judicial precedent. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). When Congress has not only remained silent but also reenacted statutory language after a judicial interpretation of that language, the implication of congressional acquiescence is even stronger: "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midatlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1985). The Court "assume[s] that Congress is

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Brooks v. Norris, 52 U.S. 204 (1850). This suggestion has been overruled by the many later cases to the contrary.

aware of existing law when it passes legislation," *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990), and Congress "thus adopts the existing interpretation unless it affirmatively acts to change the meaning," see *Fla. Nat'l Guard v. Fed. Labor Relations Auth.*, 699 F.2d 1082, 1087 (citing *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)); see also *Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535 (1954). In the face of repeated judicial interpretations of the appeal deadline provisions as mandatory and jurisdictional, Congress has never sought to correct the Court or amend its own approach. Thus, the Court should recognize in this congressional acquiescence an affirmative legislative intent to make timely appeal a jurisdictional prerequisite.

The Court should reject Bowles's attempt to disrupt the settled understanding of appeal deadlines as jurisdictional, as he offers no authority for the radical departure. Bowles suggests that the Court has already taken steps in this direction, and he cites as support the Court's language in *Kontrick v. Ryan*, 540 U.S. 443 (2004), and *Eberhart v. United States*, 126 S. Ct. 403 (2005), noting the overuse of the term "jurisdictional" to describe deadlines that were not, in fact, jurisdictional. But *Kontrick* and *Eberhart* do not support Bowles's cause, as the critical difference between those cases and this one is that neither involved *notices of appeal*.[5] Notices of appeal differ from other deadlines in significant ways.

First, unlike the deadlines at issue in *Kontrick* and *Eberhart*, appeal deadlines control when jurisdiction over a case transfers from the district to the appellate court. In each

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[5] Indeed, since *Eberhart* and *Kontrick*, the only other circuit court (besides the court below) to address directly whether an untimely appeal notice remains a jurisdictional defect has answered the question in the affirmative. See *Alva v. Teen Help*, 469 F.3d 946, 948 (10th Cir. 2006).

of the Court's recent cases addressing the misuse of "jurisdiction" to describe mere "claim-processing rules," the lower federal court had already established jurisdiction over the case when the relevant procedural violation occurred. None of these cases dealt with a situation, like here, where an appellant seeks to move his case from the jurisdiction of one court to another. For example, in *Kontrick*, a bankruptcy court obtained jurisdiction over a Chapter 7 liquidation proceeding when a debtor filed a Chapter 7 petition. 540 U.S. at 446. One of the debtor's major creditors later filed an untimely complaint objecting to the debtor's discharge. Only after the bankruptcy court decided against the debtor on the merits did the debtor argue the untimeliness of the creditor's petition. *Id.* The Court concluded that the creditor's untimely filing did not deprive the bankruptcy court of jurisdiction. *Id.* at 452-56. In *Eberhart*, 126 S. Ct. at 405, the Court evaluated provisions "virtually identical" to those at issue in *Kontrick*: the rules governing when a defendant could move for a new trial. The Court ruled that the district court did not lack "jurisdiction" to grant an improper motion for a new trial; but there the district court had had jurisdiction over the case before the untimely motion. *Id.* See also *Scarborough v. Principi*, 541 U.S. 401, 413-14 (2004) (holding that an untimely application for legal fees is not jurisdictionally defective, because the application was made in the court that *already* had plenary jurisdiction over the civil action). Here, by contrast, Bowles never triggered the Sixth Circuit's jurisdiction, because he failed to file a timely notice of appeal. Cf. *Griggs*, 459 U.S. at 58-61.

Second, not only does the notice of appeal serve the singular function of shifting jurisdictional authority from one court to another, but the timing of a notice of appeal is expressly set by Congress. No recent Court case dealt with *statutory* time limits, which evidence a congressional intent to limit the class of cases that a federal court may hear. In

Kontrick, the Court observed that "*no statute* . . . specifies a time limit for filing a complaint objecting to the debtor's discharge," and that the time prescriptions are set forth only in the Federal Rules of Bankruptcy Procedure. 540 U.S. at 448 (emphasis added). Likewise, Federal Rule of Criminal Procedure 33, the Rule at issue in *Eberhart*, 126 S. Ct. at 403-05, has no statutory analog. But when a deadline for appeal *is* set forth by statute, the Court has called it jurisdictional, even post-*Kontrick*. See *Hibbs*, 542 U.S. at 99 (stating "we have jurisdiction" to hear appeal that was timely filed under 28 U.S.C. § 2101(c)).

Indeed, *Kontrick* itself supports the position that a statutorily based deadline may be properly considered jurisdictional. Noting that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction," the *Kontrick* Court concluded that a deadline set forth in the Bankruptcy Rules was not jurisdictional and therefore an untimeliness argument premised on the rule was subject to forfeiture. 540 U.S. at 453-56. The Court observed that the deadline was part of the rules "prescribed by this Court for the practice and procedure in cases under title 11," and stated that it was "'axiomatic' that such rules "do not create or withdraw federal jurisdiction." *Id.* at 453. Significantly, the Court, in so holding, contrasted such court rules with federal statutes containing built-in deadlines, such as 28 U.S.C. § 2401(b) and, most notably, 28 U.S.C. § 2107(a).

Consistent with this understanding, the Court has placed jurisdictional significance on the distinction between rules and statutes in the context of certiorari deadlines. The 90-day deadline for certiorari petitions in criminal cases is set forth only by the Court's own rules, and the Court has thus held it is not jurisdictional. *Schacht v. United States*, 398 U.S. 58, 63-64 (1970). The 90-day deadline for civil appeals, by contrast, is set forth by statute at 28 U.S.C. § 2101(c), and the Court has repeatedly referred to that deadline as

jurisdictional. See, e.g., *Missouri v. Jenkins*, 495 U.S. at 45; *Fed. Election Comm'n*, 513 U.S. at 90-91. Even after the Court's caveat in *Kontrick* that courts and parties should facilitate clarity by avoiding inappropriate use of the word "jurisdiction," see 540 U.S. at 455, the Court has continued to refer to § 2101(c) as a jurisdictional deadline, see *Hibbs*, 542 U.S. at 99. The Court observed that only Congress can define the jurisdiction of the federal courts, and that the purpose of the Rules is simply to give effect to congressional intent in defining that jurisdiction. See *id.* at 98-99.

Similarly, reaffirming that 28 U.S.C. § 2107 is likewise a jurisdictional statute would effectuate Congress's intent in enacting the statute. In *Browder*, the Court noted:

> The purpose of the rule is clear: It is "to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose."

434 U.S. at 264 (quoting *Matton*, 319 U.S. at 415); see also *Barnhart*, 537 U.S. at 159 n.6 (characterizing § 2107 as a jurisdictional statute, and noting that such determinations are made by examining "contextual and historical indications of what Congress meant to accomplish."). The long history of jurisdictional treatment by the Court and congressional acquiescence also demonstrates that § 2107 is intended to be jurisdictional. Permitting untimely appeals in the circuit courts would defeat the congressional purpose of setting a definitive end point to litigation in federal court, and the Court should therefore hold that § 2107, just like § 2101, sets forth a jurisdictional deadline for taking an appeal.

Finally, NACDL is unpersuasive in suggesting that, even if the standard 30-day deadline for filing an appeal is

jurisdictional, the 14-day time limit for reopening the appeal is separately nonjurisdictional, even though the twin limits both arise under Rule 4(a) and under § 2107. Nothing in the text of the rule or the statute supports the idea that these related provisions have such fundamentally different natures; nothing indicates that Congress intended to treat the two deadlines differently. Further, neither Congress nor the Court would have a reason to create such a distinction, because both subsections accomplish the same jurisdictional purpose of transferring a case from the district to the appellate court, and both are concerned with enforcing the goals of finality necessary for any effective legal system. NACDL suggests the 14-day deadline is different because, it says, the putative appellant's motion to reopen serves to notify the putative appellee of the intent to appeal. But if actual notice to the parties were the sole concern underlying notice-of-appeal requirements, a litigant could successfully circumvent the notice-of-appeal deadline upon a mere showing that he notified his party-opponent, formally or informally, that he intended to appeal. Such an approach would effectively eviscerate any notice-of-appeal deadlines.

2. Even if an appeal deadline is not "jurisdictional," its satisfaction is a mandatory and nonforfeitable precondition to a court's exercise of appellate jurisdiction.

Even if the Court does not attach the label "jurisdiction" to describe a court's lack of authority to hear untimely appeals, the Court should reach the same practical result: Circuit courts not only *may*, but *must*, dismiss untimely appeals. Even if appeal deadlines are not part of subject-matter jurisdiction per se, they are nevertheless mandatory preconditions to appellate jurisdiction, and their violation creates the same categorical bar to circuit court review as would an absence of subject-matter jurisdiction. Thus, it matters little to the result here whether such

deadlines are called "jurisdictional" or some other word: The Sixth Circuit was obligated to dismiss Bowles's appeal regardless of whether it believed the State should have spoken up in district court.

Although the Court has recently suggested in dicta that the term "jurisdictional" should not be used to describe time limits, see *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 126 S. Ct. 1235, 1242 (2006), the notice-of-appeal deadline, unique among other deadlines, operates in a distinctly jurisdictional fashion. That is, the notice of appeal triggers the beginning of an appeal, and the beginning of a court of appeals's consideration of the case or controversy. The Court recognizes, therefore, that a district court loses authority over a case once a party has taken an appeal to the circuit court. See, e.g., *Carlisle v. United States*, 517 U.S. 416, 430-31 (1996). Likewise, the Court recognizes that, if a party appeals to the circuit court but then files a postjudgment motion in district court to alter or amend the judgment, the appellate court is divested of jurisdiction and the district court regains jurisdiction. See, e.g., *Stone v. INS*, 514 U.S. 386, 406 (1995). Thus, a circuit court does not have jurisdiction over a case unless and until a party actually appeals to the circuit court. "And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act." *Griggs*, 459 U.S. at 61.

In light of this distinctive role that the notice of appeal serves, this Court and lower courts have repeatedly referred to a notice-of-appeal deadline as a "prerequisite" or "precondition" to invoking appellate court jurisdiction. In *Coppedge v. United States*, 369 U.S. 438, 442 n.5 (1962), the Court characterized the appeal deadline as "a jurisdictional prerequisite for perfecting an appeal." In *Fallen v. United States*, 378 U.S. 139, the Court again called it a "jurisdictional prerequisite." In the similar context of another notice-of-appeal requirement—namely, Rule 3's requirement to name the appellee, which the Court deemed mandatory

until the Rule's revision—the Court observed, "the failure to name a party in a notice of appeal is more than excusable 'informality'; it constitutes a *failure of that party to appeal*." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) (emphasis added).

Lower courts have also described the notice-of-appeal deadline in terms of a prerequisite to appellate court jurisdiction. As the Seventh Circuit has stated,

> [T]he rules of appellate procedure have the force of law, 28 U.S.C. § 2072, and Rules 3 and 4 state conditions precedent for the *exercise* of the appellate jurisdiction granted by Article III and 28 U.S.C. § 1291. Although these conditions precedent are spoken of as 'mandatory and jurisdictional,' [citing *Browder*], the more precise effect of the rules is to state the conditions which *invoke* the jurisdiction of the court.

Young Radiator Co. v. Celotex Corp., 881 F.2d 1408, 1415 (7th Cir. 1989). The Fifth Circuit has similarly characterized Rule 4(a)'s satisfaction as a "mandatory precondition to the exercise of jurisdiction." *Sanchez v. Bd. of Regents of Tex. S. Univ.*, 625 F.2d 521, 522 n.1 (5th Cir. 1980). "Mandatory preconditions to the exercise of jurisdiction are often spoken of as jurisdictional . . . in the sense that absent compliance, the court cannot acquire jurisdiction of the cause, though otherwise it is a case within the court's subject matter jurisdiction or, as it is sometimes called, 'competence.'" *Mann v. Lynaugh*, 840 F.2d 1194 (5th Cir. 1988). Thus, even if it does not deprive the circuit court of subject-matter jurisdiction, an untimely notice of appeal is of "jurisdictional significance," *see Griggs*, 459 U.S. at 58, because the case was never properly before the court.

Viewing an appeal deadline as a jurisdictional "prerequisite" instead of a jurisdictional element does not

alter the conclusion that such deadlines are nonforfeitable. Regardless of the proper term that attaches to such preconditions to jurisdiction, courts have treated proper satisfaction of jurisdictional preconditions as a relevant issue whenever it is raised. See *Becker*, 532 U.S. at 762; *Mann*, 840 F.2d at 1197.

Thus, when a circuit court hears an untimely appeal, it does not simply err; rather, it acts outside the scope of its authority bestowed by Congress. Regardless of whether this lack of authority is labeled "jurisdictional," circuit courts must dismiss untimely appeals even if the opposing party does not raise untimeliness. The Sixth Circuit fulfilled this duty when it dismissed Bowles's untimely appeal.

C. Even if not obligated to dismiss Bowles's untimely appeal, the Sixth Circuit committed no error in doing so.

Even if appeals deadlines were not jurisdictional or jurisdictional in nature, the Sixth Circuit did not err in dismissing Bowles's appeal, because the State properly raised the argument and because, in any event, the circuit courts retain the inherent power to dismiss untimely appeals.

1. The State properly raised the issue of Bowles's untimely appeal.

Even if the deadline set forth in Rule 4 and § 2107 is viewed as a mere affirmative defense, the State properly raised the defense in its appellee brief. Forfeitable defenses must generally be raised in a party's first responsive pleading. See *Kontrick*, 540 U.S. at 458; see also *Day v. McDonough*, 126 S. Ct. 1675, 1679 (2006) (noting that an affirmative defense at the trial court level "is forfeited if not raised in a defendant's answer or in an amendment thereto").

Bowles's claim that the State has somehow forfeited the issue is erroneous, for the State properly raised the issue of Bowles's untimely notice of appeal. In its first pleading before the Sixth Circuit, the State explained its objection to jurisdiction:

> This Court lacks jurisdiction to hear this appeal . . .
>
> . . . .
>
> On February 26, 2004, through counsel, Bowles filed a notice of appeal. The Sixth Circuit correctly noted [in its show cause order] that the federal district court was only permitted to reopen the appeal period for a period of fourteen (14) days, or until February 24, 2004, and ordered Bowles' counsel to show cause why the appeal should not be dismissed for lack of jurisdiction.
>
> Correctly noting that Fed.R.App. [sic] 4(a)(6) is a mandatory and jurisdictional prerequisite, the Sixth Circuit dismissed the appeal as it applied to the Judgment filed July 28, 2003 and the Order of September 9, 2003, but graciously concluded that the appeal was timely as to the February 10, 2004 ruling . . . .
>
> . . . .
>
> This Court lacks jurisdiction to hear an appeal from any judgment denying Bowles' claims on the merits.

Respondent's 6th Cir. Br. at 1-4 (internal citations to record omitted). After the State raised the jurisdictional issue, however, Bowles replied by saying nothing. That is, Bowles declined to file a reply brief at all, forgoing his chance to address the untimeliness issue. The Sixth Circuit, in an extensive examination of the deadlines set forth in Fed. R.

App. P. 4(a)(6) and 28 U.S.C. § 2107, entered a final judgment dismissing the appeal as untimely. JA 175-92.

Only after dismissal did Bowles complain of the State's alleged forfeiture of the Rule 4(a)(6) argument. Although Bowles now insists that the State objected too late, he has never identified the precise point at which he thinks the State should have raised the untimeliness argument. He simply repeats a misleading objection that the State did not raise the untimeliness issue until thirteen months after Bowles filed his notice of appeal. The length of time, however, is irrelevant. Rather, the only germane issue for determining forfeiture is whether the State fulfilled its duty to raise the timeliness issue in its first responsive pleading. And here, it assuredly did. Indeed, a review of each step of this case's procedural history shows that the State had no obligation to raise the time bar argument any sooner than it did.

a. The State was not required to object to Bowles's untimely appeal in district court.

As a general matter, if Bowles is objecting to the State's failure to raise the timeliness issue in district court, then he is, in effect, arguing for a very strange role reversal. Under that view, the appellees, and not appellants, have the duty to ensure that appeals get filed in time, even though appellees have no interest in seeing appeals get filed at all.

Bowles also fails to identify any specific Rule that would have provided an appropriate vehicle for the State's intervention in district court. Even if one accepts the questionable proposition that a motion under Civil Rule 52(b), 59, or 60 may be used to challenge procedural orders such as the one here, as opposed to final judgments, such a motion would have run counter to the State's interest in holding Bowles to the 14-day limit because it would have tolled the time for Bowles's appeal. See Fed. R. App. P. 4(a)(4). If Bowles is suggesting that the State should have

proactively sought a resolution not expressly contemplated by the Rules, he cannot realistically argue that the State's failure to take such action should constitute forfeiture. The State cannot be held to a mandatory duty to pursue procedures not set forth in the Rules.

Equally problematic, any suggestion that the State must object in district court—or risk forfeiture—undermines the limits imposed by Appellate Rules 4 and 28 U.S.C. § 2107 on the power of district courts to grant such extensions, because it effectively gives district courts the power to grant extensions subject only to the opposing party's objection. See also Fed. R. App. P. 26(b). Requiring parties to object to unauthorized appeal extensions, lest the extensions take effect, creates an unsound duty for an appellee to act against its own interest, and would also give the district courts a de facto power that the Rules explicitly deny them.

b. The State was not required to object to Bowles's untimely appeal in the Sixth Circuit before filing its merits brief.

In federal circuit court, a party must raise any argument upon which it seeks to rely in its first merits brief. See Fed. R. App. P. 27; see also *Kontrick*, 540 U.S. at 458. Thus the State properly raised its argument in its appellee merits brief. Bowles suggests that the State should have raised the untimeliness issue before filing its appellee's brief, but again, he does not identify the precise point when the State's duty supposedly arose. To confirm that no such earlier point existed, the following step-by-step analysis examines other pleading options and shows that the State was not required to raise the issue at any point before its merits brief.

First, the State did not err by failing to move to dismiss Bowles's appeal. Sixth Circuit Rule 27(e)(1) provides that a party *may* file a motion to dismiss. The Rule does not *require* that a party file, nor does the Rule provide that a party

forfeits a defense by not filing a motion to dismiss. The permissive nature of the rule thus gives any appellee the option of moving to dismiss for lack of jurisdiction or reserving the same defense until its first responsive pleading. The same Rule also provides that "[m]otions to dismiss ordinarily may not be filed on grounds other than lack of jurisdiction." Here Bowles cannot have his proverbial cake and eat it too. The untimeliness issue is either jurisdictional or it is not. If notice-of-appeal deadlines are jurisdictional, then the State was not obliged to move to dismiss in order to preserve the issue, because jurisdiction is nonforfeitable. But if appellate deadlines are not jurisdictional, then the State was prohibited from moving to dismiss under Sixth Circuit Rule 27. In sum, filing such a motion was either barred or, at most, was optional, but was surely not required.

Second, the State had no duty to respond to a show-cause order directed at another party. Seven days after docketing his appeal, the Sixth Circuit clerk's office sua sponte ordered Bowles to show cause why his appeal was not timely filed. The court did not ask for, nor do the Appellate Rules or Sixth Circuit rules contemplate, a filing by the party not involved in the show-cause proceeding. Moreover, nothing in the rules covers whether, when a court orders a party to show cause, the opposing party is even *entitled* to participate as well. It would have been entirely inappropriate for the State to interject itself into what is essentially a dialogue between the circuit court and the violating party.

Third, the circuit court's decisions of March 10, 2004, dismissing most of Bowles's appeal, and September 8, 2004, denying Bowles a certificate of appealability, were favorable to the State. The State had absolutely no interest in upsetting these decisions. And requiring an appellee to object after a favorable decision and remind the appellant to file on time makes little sense. The State would be re-raising an issue that

had been decided in its favor and acting against its own interests.

Fourth, the State was not *able* to respond to Bowles's September 16, 2004, petition. In that filing, Bowles sought reconsideration of the circuit court's denial of his certificate of appealability. On December 28, 2004, the court granted his request and issued a certificate of appealability pursuant to Appellate Rule 40, without seeking an answer from the State. Under Appellate Rule 40, "unless the court requests, no answer to a petition for panel rehearing is permitted."

Fifth, prudence counsels against requiring—or even expecting—the State to file another petition for rehearing after Bowles's petition for rehearing. The Rules do not address whether a party can appeal from the *grant* of a certificate of appealability, or whether a party can file a *second* petition for rehearing following an unfavorable panel decision upon rehearing. And if multiple petitions are allowed, when does the process end? Logically, the petitions-for-rehearing stage could go on ad infinitum. Instead, in the interest of judicial economy, once Bowles received relief under Appellate Rule 40, the State simply acted efficiently and in accord with its true duty by briefing the timeliness issue during its first required pleading.

Because the State properly raised the untimeliness issue in its appellee merits brief, the Court could affirm the Sixth Circuit's dismissal without addressing either the jurisdictional nature of the rule or the scope of the Sixth Circuit's inherent powers.

2. An appellate court may raise notice-of-appeal deadlines sua sponte.

Even if the Court holds that notice-of-appeal deadlines are nonjurisdictional, and even if the State had forfeited its untimeliness argument, the Sixth Circuit still maintains its

inherent authority to raise the issue sua sponte. Moreover, in state habeas cases like this one, the principles of comity, federalism, and finality counsel in favor of protecting the court's prerogative to invoke claim-processing rules to protect state interests. Thus, the Sixth Circuit acted within the scope of its inherent authority by dismissing Bowles's appeal, and this Court should affirm the dismissal.

a. Appellate courts, by virtue of their inherent powers, may sua sponte dismiss appeals for lack of timeliness.

No rule, statute, constitutional provision, or other authority presented by Bowles denies the inherent authority of the appellate court to raise untimeliness sua sponte. In fact, the NACDL admits that, even if the Court concludes § 2107 is not jurisdictional, "that does not necessarily mean the court erred in dismissing the appeal as untimely," since "[e]ven nonjurisdictional rules are binding on parties and courts and noncompliance may support dismissal of an action or an appeal in appropriate circumstances." NACDL Br. at 16.

From the inception of the federal courts, "it has been understood that 'certain implied powers must necessarily result to our [c]ourts of justice from the nature of their institution.'" *Chambers v. NASCO, Inc.*, 501 U.S. 32, 52 (1991), quoting *United States v. Hudson*, 11 U.S. 32, 34 (1812). Accordingly, the Court has long recognized that federal courts have inherent powers distinct from those granted by statute. See, e.g., *Ex Parte Peterson*, 253 U.S. 300, 312 (1920) (finding the appointment of auditors is authorized by the courts' "inherent power to provide themselves with appropriate instruments required for the performance of their duties"); *Cooke v. United States*, 267 U.S. 517, 539 (1925) (recognizing a court's inherent power to sanction contempt); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629 (1962) (describing a court's inherent authority to

sua sponte dismiss an action due to a party's failure to prosecute); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980) (recognizing a court's inherent power to assess attorney fees). A court's inherent powers include all powers reasonably required to enable a court to perform its judicial functions efficiently and make its lawful actions effective. See John Cratsley, *Inherent Powers of the Courts* 2 (1980).

The exercise of inherent powers is "essential to the administration of justice," *Michaelson v. United States*, 266 U.S. 42, 65 (1924), and "absolutely essential for the functioning of the judiciary," *Levine v. United States*, 362 U.S. 610, 616 (1960). The inherent powers of federal courts cannot be dispensed with because they "are necessary to the exercise of all others." *Roadway Express*, 447 U.S. at 764 (citing *Hudson*, 11 U.S. at 34). These powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link*, 370 U.S. at 630-631.

i. The administration of justice is best served by protecting the appellate courts' power to enforce notice-of-appeal deadlines sua sponte.

The question here is whether the federal appeals courts maintain the inherent authority to enforce appellate deadlines and thus to control their dockets. This issue could be resolved in at least three distinct ways, including the options the Court analyzed in *Granberry v. Greer*, 481 U.S. 129 (1987) and *Day*, 126 S. Ct. 1675. First, the Court might conclude, as Bowles urges, that courts are powerless to enforce any appellate deadlines that a party has not defended with adequate vigor. Second, the Court could insist, as we urge above, that circuit courts dismiss any appeals that are not

timely made under Appellate Rule 4(a). Or, third, the Court could adopt an intermediate approach, as in *Granberry* and *Day*, which allows the appellate courts in each case to decide whether the administration of justice is better served by dismissing the case on inflexible claim-processing grounds or by reaching the merits of the petitioner's appeal.

In *Day*, 126 S. Ct. 1675, the Court considered whether a federal court may sua sponte dismiss a petition for habeas after the State, in its answer, had improperly admitted that the petition was timely. Petitioner Day had filed a habeas petition pursuant to 28 U.S.C. § 2254. In its answer, the State wrongly conceded the petition was timely due to statutory tolling. The magistrate judge independently inspected the pleadings, and found that the State had miscalculated the tolling time and, therefore, the petition was untimely. After giving Day a chance to show cause, the magistrate recommended dismissal. The district court agreed and dismissed the case.

The Court upheld the sua sponte dismissal of Day's habeas petition, concluding that a court is "permitted, but not obliged" to dismiss sua sponte an untimely petition. *Id.* at 1681. That was so not only where a State failed to object, but even where, as in *Day*, the State had expressly (but erroneously) conceded timeliness. Although the courts "surely have no obligation to assist attorneys representing the State," nevertheless "if a judge does detect a clear computational error, no Rule, statute, or constitutional provision commands the judge to suppress that knowledge." *Id.* at 1684. The Court reached this decision despite the State's acknowledgement that the Antiterroism and Effective Death Penalty Act of 1996's statute of limitations was not jurisdictional and could, presumably, be forfeited. *Id.* at 1681.

Similarly, though the State vigorously disputes that its assertion of the timeliness issue was belated, even if the State had completely failed to raise the issue, nothing would preclude the Sixth Circuit from exercising its inherent authority to enforce Fed. R. App. P. 4(a)(6) and 28 U.S.C. § 2107's time limitations sua sponte.

ii. *Kontrick* and *Eberhart* do not restrict the appellate courts' power to enforce notice-of-appeal deadlines sua sponte and thus to control their dockets.

Bowles claims that *Kontrick* and *Eberhart* support his view that an appellate court lacks the authority to raise sua sponte a failure to comply with the provisions of Appellate Rule 4(a) and 28 U.S.C. § 2107. He is wrong. Whatever those cases may mean about the proper terminology for the time limits for filing an appeal, nothing in *Kontrick* or *Eberhart* diminishes the federal appellate courts' inherent power to sua sponte enforce their own rules.

Nor is an appellate court's inherent authority to consider forfeited defenses sua sponte diminished by this Court's decisions in *Kontrick* and *Eberhart*. These cases, which allow for the forfeiture of claim-processing rules not raised by a party, merely specify the circumstances in which the appellate court *may* deem the claim-processing defense forfeited; they do not *require* an appellate court to deem a claim-processing defense forfeited in any set of circumstances. See generally *Kontrick*, 540 U.S. 443, and *Eberhart*, 546 U.S. 12. At most, these cases can be read to allow forfeiture of claim-processing rules, but they do not *require* a court to ignore claim-processing defects. More importantly, nothing in the Court's recent precedents reflects any intent to alter appellate courts' inherent powers to control their dockets.

In addition, stripping the appeals courts of their power to independently enforce nonwaivable notice-of-appeal deadlines would create practical problems. If appeals deadlines are classified as forfeitable but nonwaivable[6] *and* the appellate courts are deprived of their inherent power to enforce these deadlines, this combination would allow parties to manipulate the system to avoid time limits. Parties could silently collude to keep a time-barred appeal alive, and the appellate court would be powerless to act. While it might seem unlikely, at first blush, that an appellee would so conspire against its seeming interests, experience teaches otherwise. "[T]he history of jurisdictional deadlines contains many instances of parties attempting to extend a deadline by agreement, only to have the court intervene and rule it could not be done." See E. King Poor, at 223.[7] The Court should not establish a rule that would allow colluding parties to achieve by silence what they could not by stipulation.

b. In habeas, federal courts have additional authority to sua sponte protect states' interests.

Because this is a habeas case, the appeals court's sua sponte power to enforce deadlines was heightened. The Court has repeatedly held that federal courts have discretion to sua

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[6] Certain claim-processing rules are now subject to forfeiture even when they are not subject to intentional waiver. See *Kontrick*, 540 U.S. at 456. But see *Freytag v. Comm'r*, 501 U.S. 868, 895 (1991) ("A right that cannot be waived cannot be forfeited by other means.").

[7] This article cites, e.g., *Kraft v. United States*, 85 F.3d 602, 603-05 (Fed. Cir. 1996) (sua sponte dismissing appeal as untimely, even though parties argue in favor of hearing appeal); *Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502, 508 (D.C. Cir. 2003) (agency agreed not to object to late appeal), and *Slater v. Peyser*, 200 F.2d 360, 361 (D.C. Cir. 1952) (parties "stipulated" to extension of deadline for post-trial motions after it expired).

sponte raise issues such as a failure to exhaust remedies, a procedural bar, nonretroactivity, or a statute of limitations, even though states are typically expected to raise these matters. Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts (2005); see also, e.g., *Granberry*, 481 U.S. 129 (holding that the federal appellate courts have sua sponte discretion to address the issue of exhaustion despite the state's failure to introduce the defense in the lower court); *Caspari v. Bohlen*, 510 U.S. 383, 393 (1994) ("a federal court may, but need not, decline to apply [the] *Teague* [*v. Lane*, 489 U.S. 388, 310 (1989), nonretroactivity rule] if the State does not argue it."); *Day*, 126 S. Ct. at 1684 (holding that "district courts are permitted, but not obliged, to consider, sua sponte, the timeliness of a state prisoner's habeas petition."); *Long v. Wilson*, 393 F.3d 390, 403 (3d Cir. 2004) ("It is now widely recognized that judges have discretion to raise procedural defenses in habeas cases."). This is because the interests advanced by these defenses, namely comity, federalism, and finality, are institutional interests that extend beyond the interests of the litigants in any particular case.

The federal appellate courts' sua sponte authority to raise the above defenses in habeas should similarly apply to a habeas petitioner's failure to comply with inflexible claim-processing rules. Because claim-processing rules advance the same interests as do other traditional habeas defenses, it is appropriate for federal courts to raise sua sponte inflexible claim-processing rules just as it is appropriate to raise other nonjurisdictional procedural issues. *Day*, 126 S. Ct. at 1681 (noting that the statute of "limitations defense resembles other threshold barriers—exhaustion of state remedies, procedural default, nonretroactivity—courts have typed—'nonjurisdictional,' although recognizing that those defenses 'implicat[e] values beyond the concerns of the parties.'").

Claim-processing rules implicate comity, federalism, and finality, just as exhaustion, nonretroactivity, and other procedural defenses do. The Court has explained that federal and state relations are implicated by *any* federal collateral intrusion on a state court criminal judgment. See *McCleskey v. Zant*, 499 U.S. 467, 490-491 (1991). As *McCleskey* explained, procedural defenses, such as default and abuse of writ, "implicate nearly identical concerns flowing from the significant costs of federal habeas review." *Id.* And while comity and federalism are not directly implicated when a petitioner fails to introduce his claims in the first round of federal review, the Court concluded that procedural defenses are "designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior appropriate time. . . ." *Id.* at 493; see also *Engle v. Isaac*, 456 U.S. 107, 128-134 (1982) (describing how federal interference in state criminal trials frustrates states' sovereign power and noting how federal habeas challenges to state convictions give rise to unique comity concerns).

Further, potential obstacles to habeas relief are not found solely in comity interests; they are also based in the related and equally important interest of protecting final judgments. See *Teague*, 489 U.S. at 309 (application of constitutional rules announced after conviction undermines principle of finality); *McCleskey*, 499 U.S. at 493 (procedural defenses also work to vindicate the State's interest in the finality of its criminal judgments). Like other procedural defenses, such as exhaustion, abuse of writ, and the statute of limitations, application of claim-processing rules furthers the important interest of the finality of judgments.

D. No unique circumstance justifies Bowles's untimely appeal.

Bowles also attempts to avoid the consequences of his late filing by relying on the "unique circumstances" exception, applied in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) and *Thompson v. INS*, 375 U.S. 384 (1964), to the application of strict procedural deadlines. Any attempt to seek relief under the unique circumstances exception, however, must be placed in doctrinal perspective. The Court has not vindicated a unique circumstances claim in over forty years,[8] and has not even discussed the issue in seventeen years, since *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989). In addition, *Thompson* itself provoked a strong dissent from four Justices, *Thompson* at 387 (Clark, J. dissenting),[9] and cases decided since *Harris Truck* and *Thompson* have confirmed that the doctrine has very limited application. *Osterneck*, 489 U.S. at 179; see also *Houston v. Lack*, 487 U.S. at 282 (Scalia, J., dissenting) (noting that cases decided since *Harris Truck* have repudiated any notion that the doctrine should apply to the late filing of notices of appeal.)

Not surprisingly then, the courts of appeals are virtually unanimous in concluding that the doctrine is "disfavored" and/or is on "shaky grounds."[10] And few cases in the courts

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[8] The only case since *Harris* and *Thompson* in which the Court allowed a unique circumstances exception was its summary reversal in *Wolfsohn v. Hankin*, 376 U.S. 203 (1964), reversing *Wolfsohn v. Hankin*, 321 F.2d 393, 394 (D.C. Cir. 1963).

[9] Justice Clark's dissent was joined by Justices Harlan, Stewart, and White. See also *Wolfsohn* at 396 (Clark, J., dissenting) (joined by Justices Harlan, Stewart, and White).

[10] See, e.g., *Davignon v. Clemmey*, 322 F.3d 1, 10-11 (1st Cir. 2003) (noting that "the viability of the *Thompson* doctrine remains in considerable doubt" and referring to its "enigmatic nature"); *United States v. Canova*, 412 F.3d 331, 346 n.17 (2d Cir. 2005) (noting that

of appeals have actually excused a litigant's untimely filing under the unique circumstances exception. See *Fogel v. Gordon & Glickson, P.C.*, 393 F.3d 727, 731-32 (7th Cir. 2004) (noting that unique circumstances claims are rarely invoked successfully). In short, Bowles faces a difficult task in trying to achieve relief under this extraordinarily narrow exception.

And to the extent that the unique circumstances exception retains any vibrancy at all, Bowles is an especially poor candidate for invoking it for three separate reasons. First, Bowles presents no equitable considerations that would justify his claim for such extraordinary equitable relief. Second, Bowles does not satisfy the specific requirements

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"continued vitality" of doctrine has been questioned by sister circuits); *Kraus v. Conrail*, 899 F.2d 1360, 1364-65 (3d Cir. 1990) (stating that "the scope of the 'unique circumstances' rule remains murky" and referring to its "foundations" as "tenuous"); *Panhorst v. United States*, 241 F.3d 367, 371-72 (4th Cir. 2001) (questioning continued vitality of doctrine); *Cousin v. Lensing*, 310 F.3d 843, 848 n.3 (5th Cir. 2002) (questioning whether unique circumstances doctrine "remains good law"); *In re Bond*, 254 F.3d 669, 674 (7th Cir. 2001) (questioning continued vitality of doctrine); *Arnold v. Wood*, 238 F.3d 992, 996 (8th Cir. 2001) (noting that the four-Justice dissent in *Houston v. Lack* "questioned [the unique circumstances doctrine's] continuing vitality"); *Anderson v. Mouradick*, 13 F.3d 326, 329 n.5 (9th Cir. 1994) (noting that "[r]ecent Supreme Court decisions have cast doubt upon the viability of the unique circumstances doctrine" and "[o]ther courts have questioned its continuing vitality"); *Home & Family v. Eng. Res. Corp.*, 85 F.3d 478, 481 (10th Cir. 1996) ("whatever the precise contours of the 'unique circumstances' exception may be, it is a disfavored doctrine that is to be applied only in 'carefully limited circumstances.' (citation omitted)"); *Hollins v. Dep't of Corr.*, 191 F.3d 1324, 1327 (11th Cir. 1999) (referring to "the Supreme Court's shaky support for the [unique circumstances] doctrine"); *United States v. Marquez*, 291 F.3d 23, 28 (D.C. Cir. 2002) (noting that Supreme Court has not applied doctrine since 1964 and asserting that "[i]ts ongoing vitality is far from assured.").

necessary to trigger consideration of the unique circumstances exception as set forth by the Court in *Osterneck*. Third, the unique circumstances exception does not apply, in any event, to the late filing of notices of appeal.

1. Bowles does not raise an equitable claim for relief.

The unique circumstances exception is, of course, an equitable doctrine, but Bowles presents no compelling equitable reason why he should be granted this relief. Bowles was certainly aware that Appellate Rule 4(a)(6) imposed a 14-day deadline: He not only moved to reopen the time to appeal under this provision, but he also quoted the rule, including the 14-day limit, *verbatim* in his motion. See JA 148. Accordingly, Bowles could have and should have noticed that the district court's handwritten notification listed a new deadline that was 17 days, not 14 days, from the date of the order. And Bowles offers no reason why he would have needed three extra days to file the notice in the first place. Unlike the petitioner in *Harris Truck*, Bowles did not need any time to decide whether or not to appeal:[11] He presumably had already made that decision when he filed his motion to reopen. Unlike the petitioner in *Thompson*, see 375 U.S. at 385, Bowles did not need more time to move and to argue for a new trial. He needed only to file a simple notice of appeal. Indeed, while the petitioners in both *Harris Truck* and *Thompson* took some action during the period in which their time to file a notice of appeal was pending (in *Harris Truck* to seek an extension, 371 U.S. at 216, and in *Thompson* to move for a new trial, 375 U.S. at 385), Bowles did nothing other then let the 14-day period pass. This is not

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[11] In *Harris Truck* the petitioner asked for more time to file its notice of appeal because the corporate officer charged with making litigation decisions was on vacation and unreachable. 371 U.S. at 215.

the sort of equitable consideration that merits unique circumstances relief.

2. Bowles does not meet the *Osterneck* test for establishing unique circumstances.

Bowles not only fails on general equitable principles, but he also fails to meet the specific requirements under *Osterneck* to trigger consideration of the unique circumstances exception. In *Osterneck*, the Court held that the unique circumstances exception "applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." 489 U.S. at 179.

Bowles fails on both *Osterneck* factors. First, Bowles did not perform any "act" that would postpone the deadline for filing. As the Sixth Circuit correctly observed, he never sought (properly or otherwise[12]) an extension from the 14-day time limit of Rule 4(a)(6) to file his notice of appeal. See JA 188. Second, the district court did not, in any meaningful sense, assure Bowles that he could have an extension. See *id.* The district court merely wrote the wrong deadline in the margin of its order.

Bowles's failure to meet *Osterneck's* requirements demonstrates the essential weakness of his claim. The doctrine of unique circumstances is about reasonable reliance. It is not about taking advantage of district court errors. See, e.g., *Feinstein v. Moses*, 951 F.2d 16 (1st Cir. 1991) ("[T]he scope of the exception must focus upon whether the appellant's professed reliance on the actions of

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[12] Even if Bowles had asked for a 17-day extension, it would not have been a proper request, since requests for forbidden extensions can never be "properly done." See *Panhorst*, 241 F.3d at 372-73; *Weitz v. Lovelace Health Sys., Inc.*, 214 F.3d 1175, 1180 (10th Cir. 2000).

the district court was objectively reasonable."); *Pinion v. Dow Chem., U.S.A.*, 928 F.2d 1522 (11th Cir. 1991) ("[r]easonable reliance has always been a necessary prerequisite to an invocation of the 'unique circumstances' exception.").

Here, Bowles give no sound reason why it was reasonable for him to rely on the district court's unexplained use of a date that reflected three bonus days beyond what the rule allowed. The district court's notational error, unlike the district courts' errors in *Harris Truck* and *Thompson*, was not the result of a court's deliberative action granting a party its requested relief. Rather, it was a simple miscalculation that directly conflicted with the governing rule. All Bowles needed to do was to read Rule 4(a)(6)—or read his own motion, which quoted the rule and properly asked for only 14 days—to discover the error.

Not surprisingly, the appeals courts have held that any reliance is not reasonable when a district court acts in clear violation of the rules. As Judge Posner stated in *Fogel*, 393 F.3d at 731, "when a rule is unambiguous a litigant is not permitted to rely on erroneous advice, even by a court." *Id.* at 731. Similarly, in *Pinion*, the defendant-appellants relied on a district court's improper decision granting their motions to enlarge the time for filing Civil Rule 50(b) and 59 motions. In denying relief, the *Pinion* court stated:

> The reasonableness of [defendant-appellant's] reliance on the action of the district court is severely undercut by the ease with which it could have read Rule 6(b). Simply scanning the Rule would have provided notice that there was an inconsistency between the Rule's text and the court's consent order.

928 F.2d at 1534; see also *Weitz v. Lovelace Health Sys. Inc.*, 214 F.3d 1175, 1180 (10th Cir. 2000) ("[T]he mere fact that a court has granted . . . an extension does not justify reliance that is clearly at odds with the text of the rules").

The courts' reluctance to allow litigants to take advantage of such obvious errors, moreover, is supported by compelling policy concerns. As the Tenth Circuit stated in *Weitz*:

> It makes great practical sense to require the parties to comply with clearly mandated requirements in the Federal Rules. Otherwise, we would be encouraging litigants to invite courts to commit easily avoidable errors. District courts today suffer under a burdensome caseload, and a certain degree of cooperation and assistance from litigants is essential to the judicial system's effective operation.

214 F.3d at 1180. Here, too, Bowles should not be permitted to absolve himself from the responsibility of complying with clearly stated rules merely because the district court committed an obvious error. Indeed, as *Weitz* implies, allowing parties to invoke the unique circumstances exception in the case of obvious error would read the "unique" requirement out of the doctrine because of the frequency of district court mistakes caused by burdensome caseloads. *Id.*

3. The unique circumstances exception does not apply to the filing of late notices of appeal.

Bowles's invocation of the unique circumstances doctrine should also be rejected for the simple reason that the doctrine does not apply to the late filing of notices of appeal. First, as noted above in Part B.1, Rule 4(a)(6) is jurisdictional. Accordingly, equitable exceptions do not

apply. See *Owen Constr. & Erection Co. v. Kroger*, 437 U.S. 365, 377 n.21 (1978) (holding that equitable estoppel would not prevent a party from defeating diversity jurisdiction by claiming, on the third day of trial, that it was from the same state as the plaintiff even though it had previously asserted it was from a different state and even though the defeat of jurisdiction might bar the plaintiff from pursuing her action altogether because of the passage of the statute of limitations).

Second, neither *Harris* nor *Thompson* stands for the proposition that the unique circumstances exception can excuse a direct violation of notice-of-appeal time requirements. In both *Harris* and *Thompson*, the district court's errors involved tolling provisions and not the appeal deadline itself. In *Harris*, the district court issued an erroneous legal conclusion regarding whether the time to appeal could be tolled because of excusable neglect. 371 U.S. at 216-17. In *Thompson*, the district court incorrectly concluded that the petitioner had complied with time requirements regarding his filing a motion for a new trial, a motion which, if made properly, would have also tolled the time to appeal. 375 U.S. at 385, 387. Neither case held that the violation of a direct time requirement for filing a notice of appeal could be excused by unique circumstances.

This distinction makes a difference. The decision whether or not the period to file a notice of appeal can be tolled, like many district court decisions that affect the time it takes for a case to proceed to an appellate court, is properly within the district court's authority. The time for filing a notice of appeal, however, directly governs the boundaries between the district and the appellate courts, and is therefore beyond a district court's authority. Indeed, even if there were any doubt as to whether *Harris Truck* and *Thompson* could be read to excuse a litigant from a direct violation of notice-of-appeal time requirements, that doubt has been erased in

later cases. As four members of the Court explained in *Houston v. Lack*, 487 U.S. 266, cases decided since *Harris Truck* and *Thompson* have "effectively repudiate[d]" any notion that the unique circumstances doctrine allows any exception from requirements governing the timely filing of notices of appeal. *Houston*, 487 U.S. at 282 (Scalia, J., dissenting) (citing *Griggs*, 459 U.S. 56, and *Browder*, 434 U.S. 257).

Third, applying the unique circumstances exception to the late filing of notices of appeal would undermine the mandate set forth in Fed. R. App. P. 26(b) that "the court may not extend the time to file a notice of appeal." If a district court's enlargement of the time to file a notice of appeal were a "unique circumstance," courts would be able to bypass the Rule 26(b) prohibition against extending appeal deadlines, whether mistakenly or deliberately, and any extension would be immune from review once an appealing party had "relied" upon it.[13]

E. Bowles is not entitled to any further relief from either the appellate or the district court.

In a last-ditch effort to avoid the consequences of his late filing, Bowles argues that the Sixth Circuit, instead of dismissing the appeal, should have vacated the district court's February 10 order and remanded the case with instructions that the district court should issue a new order granting Bowles a fresh 14 days to appeal. Amicus NACDL, in turn, contends in its final effort that this Court should rule that the district court still retains authority to issue another

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[13] NACDL contends that Bowles, as a habeas petitioner, presents an especially compelling case for applying the unique circumstances doctrine. But his plea for more leniency in habeas has it backwards. As explained above, in the habeas context courts have a heightened duty to respect states' interests, including comity and finality. See Part C.2.b.

order reopening the time to appeal, should Bowles so request. Both positions are without merit.

1. The Sixth Circuit was neither empowered nor obliged to remand the case with instructions to the district court to reopen.

Bowles's claim that the Sixth Circuit should have remanded the case for the district court to reopen (again) the time to appeal fails. First, the appellate court did not have jurisdiction over the appeal, so it had no power to order remand. Bowles argues that the appellate court did have jurisdiction, basing his contention upon a single sentence in an April 26, 2004, order of the Sixth Circuit stating that Bowles's appeal was "timely filed as it applied to the February 10, 2004 ruling." JA at 161. But a sentence in an appellate court order cannot confer jurisdiction where none exists. Moreover, the Sixth Circuit explicitly disavowed Bowles's claim that this sentence meant that his appeal was timely filed. The Sixth Circuit explained that the sentence in question in its earlier order was only "surplusage" that "added no meaning to the order." *Bowles v. Russell*, 432 F.3d 668, 677 (6th Cir. 2005).[14] It had no legal effect.

Second, even if the Sixth Circuit had the authority to remand, Bowles offers no reason why it would have been required to do so. At best, his argument is that the Sixth

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[14] As the Sixth Circuit merits panel correctly noted, Bowles had no reason to appeal from the February 10 order granting his motion to reopen because, after all, it was favorable to him. In fact, the earlier Sixth Circuit order may have been referring to Bowles's ability to appeal another portion of the district court's February 10 order that denied Bowles's motion to vacate the court's earlier September 9 order (on grounds that he did not receive notice of that order). But Bowles never prosecuted an appeal regarding the motion to vacate and, even if he had, that action would not have given the appellate court authority over an untimely appeal from the separate district court orders on the merits.

Circuit had the discretion to remand if it considered that remedy appropriate. But, as Bowles concedes, the Sixth Circuit declined to order a remand even after he sought such relief in his petition for rehearing. Bowles offers no reason why the Sixth Circuit should be deemed to have abused its discretion in declining to order a remand. Nor could he. After all, it is certainly within a court's sound discretion to conclude that a litigant should not be excused from failing to comply with the time limit that he himself had requested in a motion to reopen.

Third, Bowles's reliance on *Becker* further undercuts, rather than supports, his remand claim. In *Becker*, the Court ruled that a pro se petitioner's failure to sign his otherwise timely notice of appeal did not require the circuit court to dismiss the appeal. Notably, the *Becker* Court expressly distinguished the Civil Rule 11(a) signature requirements that were at issue here. The Court noted that Rule 11's signature requirements are not jurisdictional, but notice of time limitations are. 532 U.S. at 765-66.

Moreover, even beyond the jurisdictional/ nonjurisdictional distinction, the *Becker* Court based its decision on the fact that Civil Rule 11(a) explicitly provides relief for a party who has not properly acted: The party can subsequently correct the error if it acts promptly after the error is called to the party's attention. See Fed. R. Civ. P. 11(a). *Becker*, therefore, cannot stand as authority for allowing litigants to correct their errors retrospectively when the governing rule in question, such as Fed. R. App. P. 4(a)(6), allows no similar remedy. Indeed, because it relies so heavily on Civil Rule 11(a)'s specific language, *Becker* is better read for the proposition that explicit authority in the rules is required before a court can order such ameliorative action.

2. The district court does not retain authority to reopen the time to appeal.

Amicus NACDL argues as its last resort that the Court should declare that the district court may, under Appellate Rule 4(a)(6), "reopen the appeal period a second time to permit a new and timely appeal." NACDL Br. at 24. However, this issue is not properly before the Court, because Bowles never filed a second request to reopen in the district court. Nevertheless, if the Court does consider NACDL's concededly "novel" suggestion, *id.* at 26, the Court should reject it on its merits.

First, such a construction of Rule 4 leads to nonsensical results. Under this reading, for example, a litigant who fails to file her notice of appeal within the initial 30-day limit would be barred from prosecuting her appeal; nothing could get her back on track. By contrast, a litigant who misses the original 30-day requirement, but is granted leave to reopen under Rule 4(a)(6), can sit back and miss the new deadline and then take yet another bite at the apple. No sound reason supports this distinction.

Second, allowing a second motion to reopen would conflict with the requirement in both Rule 4(a)(6) and 28 U.S.C. § 2107(c)(1)-(2) that a motion to reopen must be filed within 180 days after the entry of judgment or order. Here, for example, if Bowles were to now move the district court to reopen the appeal window, the elapsed time since final judgment would be over three years, or well past the 180-day limit. Recognizing this difficulty, the NACDL argues that no second motion would be needed because the district court could reopen the time to appeal in response to the original motion. NACDL Br. at 25, n.4. But that view is equally untenable, as it means that, once a motion to reopen is properly filed, it remains pending before the district court—even after the district court has ruled on it. The

unreasonableness of this construction should be self-evident; applying this approach to Bowles confirms the point. Under the NACDL's view, Bowles's motion to reopen has been continuously before the district court since it was first filed in December 2003, including during the time when his case was being considered by the court of appeals and by this Court. Not only does this view defy common sense, it also dramatically undercuts the finality and closure purposes underlying Rule 4(a)(6) and § 2107 by allowing a district court to rule on a motion to reopen years after its dispositive order was issued. See *Clark v. Lavallie*, 204 F.3d 1038, 1041 (10th Cir. 2000) (noting that "the essence of Rule 4(a)(6) is finality of judgment").

Third, the NACDL is wrong in relying on cases holding that district courts may recertify an order certifying interlocutory appeals without any additional motion from a party. To begin with, allowing a district court to recertify an interlocutory appeal without a second motion does not indefinitely extend the time that a motion is considered to be pending before the district court. The time for a district court to review a request for an interlocutory appeal ends when the district court reaches a final judgment. Here, by contrast, the NACDL's construction of Rule 4(a)(6) places no end date in sight. Additionally, the finality and closure concerns that support limiting the district court's time to reconsider a motion to reopen do not apply to a district court's decision to reconsider a motion for interlocutory appeal. Interlocutory appeals, after all, are efficiency mechanisms designed to limit the length of judicial proceedings, not to extend them. *Marisol by Forbes v. Giuliani*, 104 F.3d 524, 528 (5th Cir. 1996) (noting § 1292's purpose is to "advance the ultimate termination of the litigation."). The NACDL's view of 4(a)(6), in contrast, only reduces efficiency and delays final judgment.

Finally, the district court cannot reopen Bowles's time to appeal because this case has already proceeded to a final judgment. Bowles's motion to reopen cannot be considered as still pending before the district court, because his case effectively ended when he failed to file a timely notice of appeal.

CONCLUSION

For the above reasons, the Court should affirm the Sixth Circuit's order dismissing Bowles's untimely appeal.

Respectfully submitted,

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February 23, 2007

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SUPREME COURT U.S.
FILED
FEB 23 2007
OFFICE OF THE CLERK

(4)

No. 06-5306

In the Supreme Court of the United States

KEITH BOWLES, PETITIONER

v.

HARRY RUSSELL, WARDEN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a court of appeals may excuse the untimely filing of a notice of appeal in a civil case, where the district court has reopened the filing period for 17 days under Federal Rule of Appellate Procedure 4(a)(6), rather than the 14 days permitted by the rule, and the appellant filed his notice within the time set by the district court but not within the time allowed by the rule.

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In the Supreme Court of the United States

No. 06-5306

KEITH BOWLES, PETITIONER

v.

HARRY RUSSELL, WARDEN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether a court of appeals may excuse an appellant's untimely filing of a notice of appeal, where the district court has purported to extend the time for filing for longer than permitted by Federal Rule of Appellate Procedure 4(a)(6). The United States and its agencies are the Nation's most frequent litigants. Because this Court's resolution of the question presented can be expected to affect the conduct of litigation in which the government is involved, the United States has a significant interest in the disposition of this case. More generally, as a frequent litigant, the United States has a vital interest in the consistent and predictable application of established rules of procedure. The United States has previously

participated as *amicus curiae* in cases raising similar issues. See, *e.g.*, *Kontrick* v. *Ryan*, 540 U.S. 443 (2004).

STATEMENT

1. Petitioner was convicted of murder in an Ohio court and sentenced to imprisonment for 15 years to life. J.A. 14. After his conviction was affirmed on direct review, petitioner, who was represented by counsel, sought habeas relief in federal district court. J.A. 14-22. The district court referred the case to a magistrate judge, who recommended that the petition be denied. J.A. 89-104. The district court adopted the magistrate's findings and denied the petition. J.A. 140-141.

Petitioner then moved for a new trial or to amend the judgment. J.A. 143-144. The district court denied both motions in an order entered on September 9, 2003. J.A. 145. Under Federal Rule of Appellate Procedure 4(a)(1)(A), the time for filing a notice of appeal expired 30 days later, on October 9. See Fed. R. App. P. 4(a)(1)(A) ("In a civil case, * * * the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.").

On December 12, 2003, petitioner moved to reopen the time for filing a notice of appeal on the ground that he had not received timely notice of the district court's order. J.A. 147. He relied on Rule 4(a)(6), which he quoted in its entirety:

> Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

> (A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier; and
>
> (B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry, and;
>
> (C) the court finds that no party would be prejudiced.

J.A. 148.[1]

On February 10, 2004, the district court granted the motion to reopen. J.A. 151. Under Rule 4(a)(6), the notice of appeal was unambiguously due 14 days later, on Tuesday, February 24. In its order, however, the district court erroneously stated that petitioner had until February 27 to file. *Ibid.* ("Appeal to be filed by 2/27/04."). Petitioner filed a notice of appeal on February 26. J.A. 153.

2. The court of appeals issued an order to show cause why the appeal should not be dismissed on the

---

[1] In 2005, paragraphs (A) and (B) were amended "to specify more clearly what type of 'notice' of the entry of a judgment or order precludes a party from later moving to reopen the time to appeal" or "triggers the 7-day period to bring a motion to reopen," and "to set forth more logically the conditions that must be met before a district court may reopen the time to appeal." Fed. R. App. P. 4(a)(6) advisory committee's note (2005). The 2005 amendment did not alter the first clause of the rule, which gives the district court authority to reopen the filing time "for a period of 14 days." Therefore, the changes are not relevant to this case.

ground that the notice of appeal was untimely. J.A. 154-155. After receiving petitioner's response, a motions panel dismissed the appeal for lack of jurisdiction "as it applies to" the district court's judgment and denial of petitioner's motions for new trial or to amend the judgment, but held that "[t]he appeal is timely filed as it applies to the February 10, 2004 ruling." J.A. 161.

Thereafter, construing the appeal as an application for a certificate of appealability, see 28 U.S.C. 2253(c), the court denied a certificate. J.A. 162-163. Petitioner sought rehearing, and a motions panel granted a certificate of appealability. J.A. 174. The appeal was then briefed and submitted to a merits panel.

3. The court of appeals determined that the appeal was untimely, and it dismissed for lack of jurisdiction. J.A. 192.

The court stated that Rule 4(a) is "both mandatory and jurisdictional." J.A. 184. It acknowledged recent decisions of this Court "distinguish[ing] between rules that govern subject-matter jurisdiction and those that are 'inflexible claim-processing' rules." J.A. 181 n.1 (citing *Eberhart* v. *United States*, 546 U.S. 12 (2005) (per curiam), and *Kontrick* v. *Ryan*, 540 U.S. 443 (2004)). But it concluded that the Court's decisions to treat the rules in those cases as not implicating subject-matter jurisdiction were not controlling, for two reasons. First, while the timeliness issues in *Eberhart* and *Kontrick* had not been raised by the parties, here the respondent had objected that the appeal was untimely and therefore had "never forfeited his right to strict adherence to Rule 4." J.A. 182 n.1. Second, while *Eberhart* and *Kontrick* involved deadlines set only by rule, the time limit in Rule 4(a)(6) was set by Congress. See 28 U.S.C.

2107(c)(2) ("[T]he district court may * * * reopen the time for appeal for a period of 14 days.").

The court of appeals then addressed "a line of Supreme Court cases employing an equitable interpretation of appeals time limits." J.A. 185 (citing *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam)). The court held that those cases are relevant "only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." J.A. 188 (quoting *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169, 179 (1989)). In the court's view, this was not such a case. First, petitioner "did not attempt to postpone a deadline for filing his appeal"; instead, he sought "a reopening of the appeal period so that he might file his untimely notice of appeal." *Ibid.* Second, it was the district court, not a party, that performed the relevant act "and purported to extend the filing date beyond what was permitted by the Rule." *Ibid.* Third, the court observed that "petitioner received no assurances from the district court that his notice of appeal was timely." *Ibid.*

Finally, the court explained that the earlier motions-panel order was not conclusive under the law-of-the-case doctrine. J.A. 190. That order was "almost entirely devoid of any language even suggesting a decision of this court that jurisdiction for this appeal should be sustained." J.A. 191. While it "[q]uizically" stated that petitioner could appeal the district court's February 10, 2004 order, there would have been no reason for him to do so, since "its outcome was favorable to him." J.A. 192. The court concluded that that portion of the motion panel's order "was surplusage * * * and, therefore, it

cannot be construed as a decision of this court." *Ibid.* For this reason, the law-of-the-case doctrine posed no barrier to dismissing the appeal.

SUMMARY OF ARGUMENT

The court of appeals correctly determined that petitioner's failure to file a notice of appeal within the time specified in Federal Rule of Appellate Procedure 4(a) deprived the court of jurisdiction. The time limits for notices of appeal in civil cases—including those for reopening the filing period under Rule 4(a)(6)—have been specified by Congress, see 28 U.S.C. 2107, and this Court has repeatedly held that statutory time limits on the initiation of appeals are jurisdictional.

A statute regulating the timing of an appeal identifies the point at which the lower court's jurisdiction ends and the appellate court's jurisdiction begins. Accordingly, courts have long treated such statutes as jurisdictional. For example, when Congress created the courts of appeals in 1891, the time limit Congress imposed for filing appeals was immediately recognized to be jurisdictional. In light of this history, when Congress enacts a statute, such as Section 2107, that imposes deadlines on appeals, the statute should be presumed to be jurisdictional.

This Court's decisions in *Kontrick* v. *Ryan*, 540 U.S. 443 (2004), and *Eberhart* v. *United States*, 546 U.S. 12 (2005) (per curiam), are not to the contrary. While those cases held that two procedural rules governing timing were not jurisdictional, the rules at issue differed in two crucial respects from Rule 4(a)(6). First, they were prescribed by this Court under the Rules Enabling Act, 28 U.S.C. 2072, rather than being set forth in an act of Congress. That is a distinction that this Court has

also recognized to be significant in its treatment of the time limits governing petitions for certiorari. While the Court has, on occasion, waived the non-statutory limit applicable to petitions in criminal cases, it has treated the statutory limit in civil cases as jurisdictional and strictly enforced it. Second, the rules in *Kontrick* and *Eberhart* governed the processing of a case by one court, not the timing of the transition from one court to a higher court. Transitional rules can be more readily characterized as jurisdictional because they define a class of cases that can be brought before a particular court.

Even if Section 2107 and Rule 4(a)(6) are not jurisdictional, they still create a mandatory procedural rule that must be enforced when properly invoked. Here, the court of appeals correctly determined that respondent had objected to the untimeliness of petitioner's notice of appeal by raising the issue in its brief. Accordingly, this is not a case in which the jurisdictional label is necessary to rescue an argument from forfeiture. Whether construed as a jurisdictional rule or a truly mandatory and inflexible rule, the result in this case should be the same.

The time limits in Rule 4(a)(6) are not subject to equitable tolling. Rule 4(a)(1) creates rigid time limits that this Court has held to be "mandatory." *Browder* v. *Director, Dep't of Corr.*, 434 U.S. 257, 264 (1978). The drafters of the rule recognized that there might be cases in which strict enforcement of those limits could be inequitable, so they provided for carefully defined exceptions, of which Rule 4(a)(6) is one. There is no basis for the creation of an additional exception.

The "unique circumstances" decisions of *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371

U.S. 215, 217 (1962) (per curiam), and *Thompson* v. *INS*, 375 U.S. 384 (1964) (per curiam), do not support petitioner's claim of entitlement to tolling. To the extent that those decisions survive *Browder*, the Court has made clear that they apply only in the narrow category of cases in which "a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169, 179 (1989). This is not such a case. Petitioner sought a reopening of the time to file a notice of appeal; under Rule 4(a)(6), such a reopening is limited to 14 days. The district court purported to give petitioner 17 days in which to file, but there was no act petitioner could have performed that would properly have given him 17 days. For the same reason, even if equitable tolling were available, it would not benefit petitioner, since it was unreasonable for him to rely on an order of the district court that plainly contradicted the clear text of the rule that petitioner himself had cited and quoted in seeking relief.

ARGUMENT

THE COURT OF APPEALS CORRECTLY DISMISSED THIS CASE BECAUSE PETITIONER'S NOTICE OF APPEAL WAS UNTIMELY

A. The Filing Of A Timely Notice Of Appeal In A Civil Case Is A Jurisdictional Requirement

This Court has repeatedly held that "the taking of an appeal within the prescribed time is mandatory and jurisdictional." *United States* v. *Robinson*, 361 U.S. 220, 229 (1960); accord *Hohn* v. *United States*, 524 U.S. 236,

247 (1998); *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 314-315 (1988); *Budinich* v. *Beckton Dickinson & Co.*, 486 U.S. 196, 203 (1988); *Browder* v. *Director, Dep't of Corr.*, 434 U.S. 257, 264 (1978); see also Fed. R. App. P. 3 advisory committee's note (1967); *Becker* v. *Montgomery*, 532 U.S. 757, 765 (2001) (describing Federal Rules of Appellate Procedure 3 and 4 as "linked jurisdictional provisions").[2] Adhering to those holdings, the uniform practice of the courts of appeals has been to dismiss untimely appeals for lack of jurisdiction.

In civil cases, the time limits for filing a notice of appeal—and the limits on reopening the filing time under Federal Rule of Appellate Procedure 4(a)(6)—are prescribed by statute. See 28 U.S.C. 2107. This Court should reaffirm the settled understanding that those statutory limits are jurisdictional.[3]

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[2] These cases include both civil and criminal cases, and this Court's subsequent decisions in *Kontrick* and *Eberhart* cast some doubt on the accuracy of this statement in the context of non-statutory deadlines that govern criminal appeals. See note 4, *infra*. With regard to cases like this one where the relevant time limit is prescribed by statute, however, the quoted statement remains accurate.

[3] Because the issue is jurisdictional, courts of appeals routinely consider the timeliness of appeals *sua sponte*. See, *e.g.*, *Gochis* v. *Allstate Ins. Co.*, 16 F.3d 12, 14 n. 6 (1st Cir. 1994); *United States ex rel. McAllan* v. *City of New York*, 248 F.3d 48, 53 (2d Cir. 2001), cert. denied, 535 U.S. 929 (2002); *Smith* v. *Evans*, 853 F.2d 155, 157-158 (3d Cir. 1988); *Maksymchuk* v. *Frank*, 987 F.2d 1072, 1075 (4th Cir. 1993); *Wilkens* v. *Johnson*, 238 F.3d 328, 330 (5th Cir.), cert. denied, 533 U.S. 956 (2001); *Terket* v. *Lund*, 623 F.2d 29, 32 (7th Cir. 1980); *Arnold* v. *Wood*, 238 F.3d 992, 994-995 (8th Cir.), cert. denied, 534 U.S. 975 (2001); *Rodgers* v. *Watt*, 722 F.2d 456, 457 (9th Cir. 1983) (en banc); *Alva* v. *Teen Help*, 469 F.3d 946, 948 (10th Cir. 2006); *Jackson* v. *Crosby*, 437 F.3d 1290, 1292 (11th Cir.), cert. denied, 127 S. Ct. 240 (2006).

1. Historically, deadlines set by Congress for notices of appeal have been regarded as jurisdictional

Statutory time limits governing the transfer of a case from one tribunal to another—whether by appeal, by petition for review, or by certioriari—have traditionally been considered to be jurisdictional. They should continue to be so regarded unless Congress has provided otherwise.

A statute governing the timing of an appeal is jurisdictional because it identifies the point at which the subject-matter jurisdiction of the lower court ends and that of the appellate court begins. It therefore defines the class of cases that the appellate tribunal is competent to hear. Cf. *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004). As this Court has recognized, "[t]he filing of a notice of appeal is an event of jurisdictional significance" because "it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs* v. *Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam).

For that reason, courts have long treated statutes imposing time limits on the initiation of appeals as jurisdictional. For example, when Congress created circuit courts of appeals and gave them jurisdiction to review certain judgments of the district and circuit courts, see Circuit Court of Appeals (Evarts) Act, ch. 517, § 6, 26 Stat. 828 (1891), it imposed a six-month time limit on such appeals, see *id.* § 11, 26 Stat. 829. That limit was immediately recognized to be jurisdictional. See, *e.g.*, *United States* v. *Baxter*, 51 F. 624 (8th Cir. 1892); *Stevens* v. *Clark*, 62 F. 321 (7th Cir. 1894); *Connecticut Fire Ins. Co.* v. *Oldendorff*, 73 F. 88 (9th Cir. 1896);

Green v. *City of Lynn*, 87 F. 839 (1st Cir. 1898). Likewise, before the creation of the circuit courts of appeals, this Court had regarded statutory limitations on the timing of appeals as limitations on its own jurisdiction. See *Scarborough* v. *Pargoud*, 108 U.S. 567, 568 (1883) ("[T]he writ of error in this case was not brought within the time limited by law, and we have consequently no jurisdiction."); *United States* v. *Curry*, 47 U.S. (6 How.) 106, 113 (1848) ("[A]s this appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction.").

Congress is presumed to be aware of the background legal principles against which it legislates. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-698 (1979); cf. *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991). When it enacts a statute imposing a deadline on the initiation of an appeal, it should be presumed to intend that the deadline will be construed as jurisdictional. Of course, Congress can specify that a particular deadline is not jurisdictional. When it has not so specified, however, the deadline should be interpreted as a limitation on the court's appellate jurisdiction.

2. Recent decisions treating certain deadlines as "claim-processing rules" do not apply to Rule 4(a)

Petitioner relies (Pet. Br. 11-12) on recent decisions of this Court cautioning that there is "a critical difference between a rule governing subject-matter jurisdiction and an inflexible claim-processing rule." *Kontrick*, 540 U.S. at 456; see *Eberhart* v. *United States*, 546 U.S. 12, 13 (2005) (per curiam) (quoting *Kontrick*, 540 U.S. at 456). As the Court has observed, "[j]urisdiction * * * is

a word of many, too many, meanings." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (quoting *United States* v. *Vanness*, 85 F.3d 661, 662 n.2 (D.C. Cir. 1996)). "Clarity would be facilitated," the Court has said, if the word "jurisdictional" were used "not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Kontrick*, 540 U.S. at 455.

Petitioner's reliance on the decisions in *Kontrick* and *Eberhart* is misplaced. Those cases in no way undermine the jurisdictional nature of *statutes* governing the initiation of appeals. Such statutes impose *jurisdictional* limits worthy of the name.

Kontrick involved Federal Rule of Bankruptcy Procedure 4004(a), which provides that an objection to a debtor's discharge "shall be filed no later than 60 days after the first date set for the meeting of creditors." A creditor filed a timely objection, but he subsequently amended his filing (outside the time limit) to add a new objection. See 540 U.S. at 448-449. The debtor responded on the merits without noting the untimeliness of the new objection; only later did he raise the issue, arguing that the timing rule was "jurisdictional" and therefore a claim of untimeliness could not be forfeited. See *id.* at 450-451. This Court rejected that argument, holding that because Rule 4004 concededly did not affect the bankruptcy court's subject-matter jurisdiction, see *id.* at 454, it was merely an "inflexible claim-processing rule" that could "be forfeited if the party asserting the rule waits too long to raise the point," *id.* at 456.

Eberhart involved Federal Rule of Criminal Procedure 33, which allows district courts to grant new trials

but requires that "[a]ny motion for a new trial * * * must be filed within 7 days after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(2). Eberhart filed an untimely new-trial motion, and the government responded on the merits without addressing the issue of timing. See 546 U.S. at 13-14. This Court held that the government had forfeited its objection to the untimeliness of the motion. See *id.* at 19. In so holding, it concluded that Rule 33 is not jurisdictional: "It is implausible that the Rules considered in *Kontrick* can be nonjurisdictional claim-processing rules, while virtually identical provisions of the Rules of Criminal Procedure can deprive federal courts of subject-matter jurisdiction." *Id.* at 16.

The decisions in *Kontrick* and *Eberhart* turned on two key features of the time limits at issue. First, those limits were set out in rules adopted by this Court under the Rules Enabling Act, 28 U.S.C. 2072, rather than in a statute enacted by Congress. Second, they regulated the conduct of proceedings within a court, rather than the transfer of proceedings from one court to another.

a. Both *Kontrick* and *Eberhart* involved non-statutory rules. While *Eberhart* did not discuss this feature of the rules explicitly (but did emphasize the similarity of the rules in that case to those at issue in *Kontrick*, see 546 U.S. at 16), this fact was central to the Court's analysis in *Kontrick*. The *Kontrick* Court began its discussion of jurisdiction by emphasizing that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction." 540 U.S. at 452; see U.S. Const. Art. III, § 1. The Court noted that "[c]ertain statutory provisions governing bankruptcy courts contain built-in time constraints," and it distinguished such provisions from "the time constraints applicable to ob-

jections to discharge," which were "contained in Bankruptcy Rules prescribed by this Court." 540 U.S. at 453. Rules prescribed by the Court, it explained, "do not create or withdraw federal jurisdiction." *Ibid.* (quoting *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 370 (1978)); see *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 10 (1941).

The distinction between time limits prescribed by statute and those prescribed only by rule is also reflected in this Court's approach to its certiorari jurisdiction. Supreme Court Rule 13 provides that a petition for a writ of certiorari must be filed within 90 days of the entry of the judgment sought to be reviewed, unless a Justice grants an extension (which may not exceed 60 days). See Sup. Ct. R. 13.1, 13.5. On its face, the rule applies to all cases, whether civil or criminal. But for civil cases, the time limits are also set out in a statute. See 28 U.S.C. 2101(c).

This Court has treated the non-statutory criminal time limit very differently from the statutory civil time limit. In criminal cases, the Court has held that the time limit may be waived: "The procedural rules adopted by this Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Schacht* v. *United States*, 398 U.S. 58, 64 (1970). In civil cases, on the other hand, the Court has repeatedly held the limit to be jurisdictional, see, *e.g.*, *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 90 (1994); *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942), and Supreme Court Rule 13.2 cites Section 2101(c) in directing the clerk not to file any petition "that is *jurisdictionally* out of time." (emphasis added). The Court has refused to accept untimely petitions even

in cases presenting extraordinary extenuating circumstances. See, *e.g.*, *Deal* v. *Cincinnati Bd. of Educ.*, 402 U.S. 962 (1971) (petition lost by airline); *Teague* v. *Regional Comm'r of Customs*, 394 U.S. 977 (1969) (petition delayed by severe snowstorm); see also *Northwest Airlines, Inc.* v. *Spirit Airlines, Inc.*, 127 S. Ct. 340 (2006) (No. 06M7) (denying a motion to direct the clerk to file an untimely petition for a writ of certiorari).

b. A second feature of the rules at issue in *Kontrick* and *Eberhart* is that they involved the processing of claims by one court, not the transfer of a case from one court to a higher court. When prescribed by statute, the latter type of deadline may more readily be characterized as a jurisdictional rule than the rules at issue in *Kontrick* and *Eberhart*, since the deadline delineates a category of cases that can be brought before a court. As Judge Posner has observed, "[t]he emergent distinction, so far as classification of deadlines as jurisdictional or not jurisdictional is concerned, is between those deadlines that govern the transition from one court (or other tribunal) to another, which are jurisdictional, and other deadlines, which are not." *Joshi* v. *Ashcroft*, 389 F.3d 732, 734 (7th Cir. 2004).

Analogously, this Court has held that the time limit on filing a petition for review of a deportation order—a petition that transfers a case from the Board of Immigration Appeals to the court of appeals—is jurisdictional. See *Stone* v. *INS*, 514 U.S. 386, 406 (1995) (holding that "the Court of Appeals lacked jurisdiction to review" a deportation order because the petition for review was untimely). And in other cases governed by the Administrative Orders Review Act of 1950 (Hobbs Act), the courts of appeals have uniformly held that the 60-day time limit on petitions for review is jurisdictional

and may not be waived even by consent of the parties. See 28 U.S.C. 2344; *Cellular Telecomms. & Internet Ass'n* v. *FCC*, 330 F.3d 502, 508 (D.C. Cir. 2003); *Florilli Corp.* v. *Pena*, 118 F.3d 1212, 1214 (8th Cir. 1997).

3. The deadlines in Rule 4(a) are jurisdictional

Applying these principles, the time limits in Rule 4(a)—including the reopening provision of Rule 4(a)(6)—should be regarded as jurisdictional. Critically, the time limits in Rule 4(a) are prescribed by statute. And Rule 4(a) governs a step that must be taken to bring a case from the district court to the court of appeals, rather than a step in the processing of a case by one court.[4]

The basic time limit for appeals in civil cases is set by 28 U.S.C. 2107(a), which states that "no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree."[5] Subsection (c)(2), in turn, provides that "the district court may * * * reopen the time for appeal for a period

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[4] Criminal appeals are different. Because no statute governs the timing of a defendant's notice of appeal in criminal cases, the United States has argued that the time limits in Federal Rule of Appellate Procedure 4(b) are not jurisdictional. See Gov't Br. at 14-21, *United States* v. *Leijano-Cruz*, 473 F.3d 571 (5th Cir. 2006) (No. 05-50280). Nevertheless, while the difference between the statutory deadline for civil appeals and the rule-based deadline for criminal appeals may be relevant in cases in which an objection is not timely raised, Rule 4(b) is a rigid, inflexible claim-processing rule that must be strictly enforced when properly invoked. See *Leijano-Cruz*, 473 F.3d at 574.

[5] Subsection (b) provides for a 60-day limit in cases where "the United States or an officer or agency thereof is a party." 28 U.S.C. 2107(b); see Fed. R. App. P. 4(a)(1)(B).

of 14 days from the date of entry of the order reopening the time for appeal," if certain conditions—*i.e.*, those identified in Rule 4(a)(6)—are satisfied.

It is true that the time limit for notices of appeal appears in a separate statutory section from the general grant of jurisdiction to courts of appeals. See 28 U.S.C. 1291, 2107. But this Court has observed—identifying Section 2107 as an example—that "some time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 160 n.6 (2003). Significantly, the Court in *Kontrick* offered Section 2107 as an example of a congressional determination of "a lower federal court's subject-matter jurisdiction." 540 U.S. at 452, 453 n.8; cf. *Houston* v. *Lack*, 487 U.S. 266, 281 (1988) (Scalia, J., dissenting) ("The bar erected by §2107 in civil cases is jurisdictional.").

Because compliance with Rule 4(a) is jurisdictional, the court of appeals correctly determined that it lacked jurisdiction over petitioner's untimely appeal. The district court's error, though unfortunate, could not confer jurisdiction where it did not exist.[6]

B. Even If Federal Rule Of Appellate Procedure 4 Is Not Jurisdictional, It Is A Mandatory Rule That Must Be Enforced When Properly Asserted

Even if Rule 4(a)(6) is not jurisdictional, the judgment of the court of appeals should be affirmed on the

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[6] The one court of appeals, other than the court below, that has squarely confronted the question whether Rule 4(a) is jurisdictional in light of *Kontrick* and *Eberhart* has concluded, in accord with the decision below, that "[n]either *Eberhart* nor *Kontrick* affects the jurisdictional nature of the timely filing of [a] civil appeal." *Alva* v. *Teen Help*, 469 F.3d 946, 952-953 (10th Cir. 2006).

ground that the rule is mandatory and must be enforced when it is invoked by a party. The non-jurisdictional status of the rules in *Kontrick* and *Eberhart* was critical because the timeliness objection had been forfeited, and only a jurisdictional objection would survive. Here, by contrast, respondent properly objected to the untimeliness of petitioner's notice of appeal. Even if Rule 4(a)(6) is not strictly jurisdictional, it is clearly the type of mandatory and inflexible rule that must be strictly enforced when a timely objection is raised. Rule 4(a)(6) contains no equitable exception that would excuse an untimely filing in the circumstances presented here. Nor may petitioner circumvent the time limits of Rule 4(a)(6) by asking the district court to enter a second order reopening the time for filing a notice of appeal.

1. Respondent properly objected to the untimeliness of petitioner's notice of appeal

Kontrick and *Eberhart* make clear that even non-jurisdictional timing rules "assure relief to a party properly raising them." *Eberhart*, 546 U.S. at 19; see *Kontrick*, 540 U.S. at 456 (a "claim-processing rule" can be forfeited if not raised but may also be "unalterable on a party's application"). Here, the court of appeals correctly determined that respondent had properly raised the issue of petitioner's untimely notice of appeal by addressing it in its brief. See J.A. 181 n.1; Resp. C.A. Br. 2-3 (noting that the "district court was only permitted to reopen the appeal period for a period of fourteen (14) days," and that its order had "erroneously" allowed additional time); *id.* at 4 ("This Court lacks jurisdiction to hear an appeal from any judgment denying [petitioner's] claims on the merits.").

Petitioner suggests (Pet. Br. 11-12) that respondent should have objected sooner. But respondent had no basis to object to petitioner's motion to reopen, which did not seek more than the 14 days permitted by the rule. J.A. 148. Nor did it have occasion to object when the district court entered an order granting petitioner 17 days to file. An objection at that point would have been premature, since there was no way to know whether petitioner would actually take more than 14 days. In any event, the burden was not on respondent to be attentive to petitioner's notice-of-appeal deadline. Some litigants may choose to assist opposing parties in keeping track of filing deadlines, but there is no requirement that they do so. Petitioner cites no authority for the proposition that respondent was obliged to seek reconsideration of the district court's order. Cf. *Fuesting* v. *Zimmer, Inc.*, 448 F.3d 936, 940-941 (7th Cir. 2006) (post-judgment motion is not required to preserve an issue for appeal), cert. denied, No. 06-685 (Jan. 22, 2007).

Respondent could have filed a motion to dismiss as soon as the case reached the court of appeals. It had no duty to do so, however. See *United States* v. *Singletary*, 471 F.3d 193, 196 (D.C. Cir. 2006) ("There is no provision in the * * * Federal Rules of Appellate Procedure that requires a party to address the untimeliness of an appeal by filing a motion to dismiss."). Instead, raising the issue in its brief, its first appellate filing, was an appropriate way to preserve its rights.

2. *The time limit set out in Federal Rule of Appellate Procedure 4(a)(6) is not subject to equitable exceptions*

Petitioner argues (Pet. Br. 14-19) that the time limit for filing a notice of appeal is subject to equitable tolling, and that tolling is appropriate in the "unique circumstances" of this case. But simply because a rule is non-jurisdictional, it does not follow that it is subject to equitable tolling. Here, the structure of the rules suggests that equitable tolling is not available. And even if tolling were available, it would not be warranted by the facts of this case.

a. Petitioner is correct that a time limit may be phrased in seemingly categorical terms but still be subject to equitable tolling. Thus, this Court has recognized the settled "understanding that federal statutes of limitations are generally subject to equitable principles of tolling." *Rotella* v. *Wood*, 528 U.S. 549, 560 (2000); see *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 27 (1989) ("The running of such statutes is traditionally subject to equitable tolling."). Tolling does not apply, however, when it would be inconsistent with the text or structure of the statute. See *United States* v. *Brockamp*, 519 U.S. 347, 350-352 (1997). For example, tolling is inappropriate when a statute already provides for equitable exceptions. See *United States* v. *Beggerly*, 524 U.S. 38, 48-49 (1998).

The text and structure of the Rules of Appellate Procedure suggest that it would be inappropriate to recognize an equitable exception to the time limit in Rule 4(a)(6). The drafters of the rules—and of Section 2107— were aware that there might be circumstances in which strict application of the time limits could be ineq-

uitable. That is why Rule 26(b) allows the court, for "good cause," to "extend the time prescribed by these rules." But Rule 26(b) contains an important exception: "[T]he court may not extend the time to file * * * a notice of appeal (except as authorized in Rule 4)." Rule 4, in turn, contains two specific ways in which the district court may extend the time: by 30 days on a showing of "excusable neglect or good cause" under Rule 4(a)(5)(A)(ii), or by 14 days under Rule 4(a)(6). Since these provisions are themselves exceptions to the rigid time limits of Rule 4(a)(1), designed to eliminate inequities, there is no warrant for the creation of an additional exception. Cf. *Beggerly*, 524 U.S. at 48-49.[7]

In sum, Federal Rule of Appellate Procedure 4(a) is drafted in such "emphatic" terms as to negate the "presumption" that equitable tolling is available to remedy "unfairness in individual cases" by extending the filing

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[7] Petitioner argues (Pet. Br. 22) that the district court has authority to extend the notice-of-appeal deadline beyond the limits set out in Rule 4. He relies on Federal Rule of Appellate Procedure 1(a)(2), which states that when a "motion or other document" must be filed in the district court, "the procedure must comply with the practice of the district court," and on Federal Rule of Civil Procedure 6(b), which allows the district court to extend various time limits. Petitioner's interpretation of these rules is incorrect. Appellate Rule 1(a)(2) simply means that filings in the district court must be submitted "in the form and manner prescribed by" the rules governing "the form and presentation of motions." Fed. R. App. P. 1 advisory committee's note (1979); see *Becker*, 532 U.S. at 763. Petitioner cites no authority—and we are aware of none—suggesting that Rule 1(a)(2) displaces the explicit, carefully tailored limitations of Rules 4(a) and 26(b), thereby giving the district court unlimited authority to enlarge the time for filing a notice of appeal. Nor does Rule 6(b), which applies to deadlines set by the *civil rules* or a court order, give authority to a district court to override express deadlines in the *appellate rules*, particularly rules that reflect statutory deadlines.

deadline. *Brockamp*, 519 U.S. at 350, 353. The rule is "mandatory," *Browder*, 434 U.S. at 264, "rigid," *Eberhart*, 546 U.S. at 13, and "inflexible," *Kontrick*, 540 U.S. at 456. That character is only reinforced by the role of the rule in the boundaries—whether or not strictly jurisdictional—between the trial and appellate courts. See p. 16, *supra*. To be sure, the application of Rule 4(a) may sometimes produce harsh results, but that is true of any deadline. See *United States* v. *Locke*, 471 U.S. 84, 101 (1985).

b. Petitioner errs in relying (Pet. Br. 16) on the "unique circumstances" decisions of *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam), and *Thompson* v. *INS*, 375 U.S. 384 (1964) (per curiam). In *Harris*, the district court granted an extension of the notice-of-appeal deadline for "excusable neglect," under what was then Federal Rule of Civil Procedure 73(a). See 371 U.S. at 216; see also Fed. R. App. P. 4(a)(5)(A)(ii). The court of appeals determined that the standard for excusable neglect had not been met, and it dismissed the appeal. See 371 U.S. at 216. This Court reversed, noting "the obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect.'" *Id.* at 217. In *Thompson*, the appellant filed an untimely new-trial motion that the district court erroneously declared to be timely; he then filed a notice of appeal within 60 days of the denial of his motion but not within 60 days of the original judgment. See 375 U.S. at 385-386. Relying on *Harris*, this Court held that the appeal could proceed because the appellant "did an act which, if properly done, postponed the deadline for the filing of his appeal," and "the District Court concluded that the act had been properly done." *Id.* at 387.

This Court has not actually applied either *Harris* or *Thompson* since its one-sentence order in *Wolfsohn* v. *Hankin*, 376 U.S. 203 (1964) (per curiam). Significantly, the Court declined to apply *Thompson* in *Browder*, despite facts that were virtually identical: the appellant filed an untimely new-trial motion; the district court considered the motion on the merits, and the appellant delayed filing his notice of appeal while the motion was pending. See 434 U.S. at 260-263. This Court held that the court of appeals lacked jurisdiction over the untimely appeal. See *id.* at 264-265. As several courts of appeals have recognized, *Browder* "casts considerable doubt on the continued viability of the unique circumstances doctrine." *Panhorst* v. *United States*, 241 F.3d 367, 371 (4th Cir. 2001); see *Parke-Chapley Constr. Co.* v. *Cherrington*, 865 F.2d 907, 913 n.6 (7th Cir. 1989); *Smith* v. *Evans*, 853 F.2d 155, 160-161 (3d Cir. 1988); see also *Lack*, 487 U.S. at 282 (Scalia, J., dissenting) ("Our later cases * * * effectively repudiate the *Harris Truck Lines* approach.").

The Court need not determine whether the "unique circumstances" cases have any continuing vitality, because those cases are inapplicable here. But cf. *Lapides* v. *Board of Regents of Univ. Sys.*, 535 U.S. 613, 622-623 (2002) (overruling *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945), as inconsistent with other Supreme Court decisions despite acknowledging that *Ford* could be distinguished). The result in *Harris* can be explained—and *Harris* can be distinguished from this case—on grounds of practicality and sound judicial administration. The rules give the district court discretion to determine whether there has been a showing of "excusable neglect" that would justify an extension. But an extension issued before the notice-of-appeal deadline

has passed would be of little value if parties had to worry that "an appellate court [might] second-guess the wisdom of the exercise of discretion under Rule 4." *Bailey* v. *Sharp*, 782 F.2d 1366, 1369 (7th Cir. 1986) (Easterbrook, J., concurring). For this reason, it might make some sense to say, in effect, that the district court's determination should be conclusive. That rationale does not apply here, where the district court lacked discretion over the length of the period during which it could reopen the time for filing an appeal. That period was fixed by statute at 14 days.

Thompson is similarly unhelpful to petitioner. While a broad reading of *Thompson* might suggest the general proposition that parties should not suffer for relying on the district court's statements about deadlines, the Court has made clear that *Thompson* is not to be read broadly. Instead, it "applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169, 179 (1989). This is not such a case. Petitioner performed an act—filing a motion under Rule 4(a)(6)—which, if properly done, could have given him no more than 14 days in which to file a notice of appeal. There was no act petitioner could have performed that would have given him 17 days. *Thompson* is therefore inapplicable here. Moreover, *Thompson* involved a situation in which the district court's ruling primarily affected proceedings in that court, with only an incidental effect on the deadline for filing an appeal. Here, by contrast, the district court's erroneous ruling addressed a motion to extend the time for filing an appeal, and so directly implicated the interest in ensuring strict com-

pliance with the rules for transferring cases from one court to another.

c. Finally, even if there were an equitable exception to the 14-day limit of Rule 4(a)(6), it should, at a minimum, require that a party have reasonably relied on the statements of the district court. Cf. *Lawrence* v. *Florida*, No. 05-8820 (Feb. 20, 2007), slip op. 8 (assuming the availability of equitable tolling under 28 U.S.C. 2254(d), and stating that it would require the defendant to show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing") (citation and internal quotation marks omitted). Here, petitioner's reliance was unreasonable.

Petitioner had just filed a motion seeking an extension under Rule 4(a)(6), and the motion quoted the entire text of the rule. J.A. 148. Petitioner was therefore well aware that the rule allows the district court to "reopen the time to file an appeal for a period of 14 days," not to reopen the time for a period of 17 days. Fed. R. App. P. 4(a)(6). It would have been easy for petitioner to calculate that a 14-day period from the entry of the district court's February 10 order would expire on February 24, not February 27. Petitioner had no basis for relying on the February 27 date, which was plainly erroneous. Certainly, nothing that the district court did "prevented timely filing." *Lawrence*, slip op. 8.

The unreasonableness of petitioner's conduct is compounded by the fact that the notice of appeal is a one-sentence document that is easy to prepare. See Fed. R. App. P. 3(c). Indeed, the rules provide a simple form for appellants to follow. See Fed. R. App. P. Form 1. By the time he filed his Rule 4(a)(6) motion, petitioner apparently had already determined that he wished to ap-

peal. See J.A. 148 (explaining that petitioner sought reopening so "that [he] may timely file a notice of appeal"). Petitioner makes no effort to explain why the 14-day period provided by the rule was insufficient for him to prepare and file a notice of appeal.

3. The district court may not enter a second order reopening the time to file a notice of appeal

Petitioner suggests (Pet. Br. 21) that the case should be remanded to the district court with instructions to enter an order reopening his time for filing an appeal for 14 days, calculated from the date of that new order. This is so, he alleges, because that court of appeals motions panel stated that petitioner's appeal was "timely filed as it applies to the [district court's] February 10, 2004 ruling." J.A. 161. But as the court of appeals merits panel correctly observed, J.A. 192, that ruling was not adverse to petitioner, since it granted his motion to reopen his appeal time. As a result, petitioner could not appeal the February 10 ruling, see *Mathias* v. *WorldCom Techs., Inc.*, 535 U.S. 682, 684 (2002) (per curiam), and consistent with the reality that the February 10 order was favorable to petitioner, his notice of appeal did not identify that ruling as an order to be appealed, see J.A. 153. The February 10 ruling therefore provides no basis upon which this Court could remand the case to the district court for the issuance of a new order reopening petitioner's time for appeal.

The district court no longer has authority to reopen petitioner's time for filing a notice of appeal. Rule 4(a)(6) requires that the motion to reopen be filed within 180 days of the entry of judgment. That time has long since passed. Amicus National Association of Criminal Defense Lawyers suggests (Amicus Br. 25) that the rule

permits the district court to enter a second reopening order based on petitioner's original motion. This reading of the rule would allow petitioner to circumvent Congress's decision that a court may reopen a party's appeal time under Rule 4(a)(6) for only 14 days. See 28 U.S.C. 2107. Indeed, under this argument, a court could extend the time for filing a notice of appeal under Rule 4(a)(6) indefinitely, merely by issuing new orders granting successive 14-day extensions based on a party's original motion. That would negate a core feature of the limited relief Congress authorized. It also would defeat the purpose of requiring that a motion to reopen be filed within 180 days after entry of the judgment or order being appealed. See Fed. R. App. P. 4(a)(6)(B). That limitation is intended to provide an "outer time limit" to ensure that the relief provided under Rule 4(a)(6) does not suspend the finality of a judgment or order indefinitely. See Fed. R. App. P. 4 advisory committee's note (1991).[8]

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[8] Amicus also relies (Amicus Br. 26) on decisions holding that a district court may recertify an order for interlocutory appeal under 28 U.S.C. 1292(b) if a party fails to ask the court of appeals to permit such an appeal within 10 days of the district court's first certification order. Those decisions are inapposite. Section 1292(b) allows interlocutory appeal of district court orders at any time during the course of the litigation, so long as the district court makes the requisite findings. There is no requirement that the certification order be sought or entered within a specific period of time after the order sought to be appealed. See 28 U.S.C. 1292(b); Fed. R. App. P. 5(a)(3). In contrast, 28 U.S.C. 2107(c) and Federal Rule of Appellate Procedure 4(a)(6) pertain to appeals from final judgments, and their strict time limits promote important finality interests that are not present in the context of Section 1292(b).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 2007